THE ELEMENTS
OF THE
LAW OF TRUSTS

BY

GEORGE GLEASON BOGERT, A.B., LL.B.

OF THE NEW YORK STATE BAR AND OF THE FACULTY OF LAW OF CORNELL UNIVERSITY

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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

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FIFTEEN VOLUMES

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PUBLISHER'S NOTE.

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The reporter and statutory citations have been verified by Edgar A. Jonas, Lit.B., LL.B., of the Chicago Bar.

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LAW OF TRUSTS

BY

GEORGE GLEASON BOGERT, A.B., LL.B.*

CHAPTER I.

INTRODUCTION AND HISTORY.

1. **Definition of fundamental terms.**—"A trust, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another."[1] The person who creates the trust is said to settle a trust upon another, and is called the *settlor* or *trustor*. He to whom the property is given in trust and in whom the legal title vests is called the *trustee*. The one for whose benefit the trust is created is called the *cestui que trust*[2] or beneficiary. The property which is given in trust is called the subject-matter or trust *res*. Thus, if A deeds to B 100 acres of land to hold in trust for C, collect the income therefrom and pay it to C, A is the settlor or trustor, B is the trustee, C is the cestui que trust or beneficiary and the 100 acres of land is the subject-matter or trust res.

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1 Bispham, Principles of Equity (5th ed.), p. 77.

2 Meaning literally "the one who trusts" and pronounced as if spelled cĕst-wē kuh trust. Anderson, Dictionary of Law, p. 162.

Throughout this article, wherever possible, the term beneficiary will be used in preference to the equivalent words cestui que trust, which, because of their foreign origin, are productive of confusion and difficulty to the beginner.

2. **Technical meaning of word "trust" distinguished from popular.**—Trusts as here treated should not be confused with the combinations or monopolies to which the same name is now popularly applied. Such industrial combinations were originally called "trusts" because the stock of the combining corporations was transferred to trustees to accomplish the combination. These trade combinations, however, have no essential connection with the trusteeships with which this article deals. Nor should the word "trust" as here used be considered synonymous with trust in the popular sense of entrust or confide. Not every entrusting or confiding of property to another gives rise to the relationship legally known as a trust, but only in those cases in which the one entrusted becomes the owner of the property and assumes the technical relationship of trustee does the relationship arise.

3. **Origin and history of trusts.**—Wherever man is highly civilized, business dealings are frequent and property abundant, the necessity of acting through intermediaries and controlling property through others is felt. This demand by man for the aid of others in the transaction of business has given rise to the law of agency, master and servant, and trusts.

As early as the fourteenth century in England the custom of conveying land to one "to the use of"

another had arisen.[3] Thus, A would convey land to B "to the use of A," with the object that B become the legal owner of the land but A enjoy it and take the profits. B, in the example given, was called the feoffee to uses and A the cestui que use. B owned the legal title and A owned a use. Under the system of holding land then in force this conveyance to uses gave A certain benefits and exemptions which he would not have had as the holder of the legal title. Thus, while B so held the land, A would not forfeit it for treason as he would land which he held in his own name. And by making a conveyance of land to B "to the use of X upon the death of A," A could dispose of the land after his death, although he could not at that time give the land away by will. And so, although by the Statutes of Mortmain, religious houses could not hold land, A might convey lands to B "to the use of" a certain religious corporation, which thus became entitled to the benefits of the lands, although it did not own them. So, too, the interest held by the cestui que use was not subject to dower or curtesy.

Therefore, for these and various other reasons, it was advantageous to employ this device known as a use.

4. **Same subject—Continued.**—From very early times a person might give money or other personal property to another to hold in trust and the beneficiary had a remedy at the common law. But the rights of those for whose benefit these uses in *land* were created were not at first recognized as enforcible

[3] Maitland, The Origin of Uses, 8 Harvard Law Review, 127.

by the courts, but rested for their safety only upon the honor of the man entrusted. The courts of the common law administered a system in which the rights protected were only those provided for by the writs of that court and there was no writ to protect the use.

Where the common law afforded no remedy it was the custom to appeal to the chancellor, who was the custodian of the king's conscience. And so persons aggrieved because uses in land had not been carried out for their benefit and because they could get no remedy at common law, petitioned the chancellor for relief. As early as the beginning of the fifteenth century this officer came to recognize the justice of these complaints and to enforce the use, that is, to decree that the feoffee to uses hold the land not for his own benefit, but for the benefit of the cestui que use, and that the cestui que use be allowed to take the profits. In taking such action equity was following the example of the common law courts with respect to uses and trusts in personal property, and was carrying out the first principle of equity, namely, that relief be given where justice required relief, regardless of forms and technicalities.

Thus it came about that the court of chancery, presided over by the chancellor, had exclusive jurisdiction of uses and trusts. This court and its successors have administered what are known as the rules of equity rather than the rules of the common law, and hence to this day the courts of equity or chancery are the exclusive custodians of trusts. They created uses and trusts when the common law

would not recognize the rights of the cestui que use and the cestui que trust, and they have ever since exclusively administered uses and trusts.[4]

It was long thought that the English uses and trusts were modeled after the Roman relationship known as the *fidei commissum,* in which by will property was entrusted to one to dispose of in a stated way. But later scholarship has shown that there is no such connection, and that the use and trust were substantially original creations of the English law. The trust is not now known to systems of law other than the English.

5. **Use and trust distinguished.**—The words "use" and "trust" were both known to the law before the Statute of Uses took effect in 1535. Trust was the more general term and included all obligations recognized by the courts of equity which arose from the entrusting of the legal title of property to one for the benefit of another. Trusts were at that time special and general. Special trusts were those in which the property was held for a temporary and particular purpose, with active duties placed upon the trustee, as where land was conveyed "to A to collect the profits and deliver them to B during a given period." General trusts were those in which the property was to be held permanently and the object was merely a general one, with no active duties to be performed by the trustee, as where land was conveyed "to A to the use of B," in which case B would have the right to take the benefits of the land indefinitely and A would have no duties. These gen-

[4] Reeves, Real Property, §§ 294-304.

eral trusts were also called uses. Thus technically all uses were trusts, but not every trust was a use. Although there is this distinction between the meaning of the words use and trust before the Statute of Uses, yet the words were often employed in a loose way as synonyms.[5]

6. **The Statute of Uses.**—The use (or general trust) and the special trust were both in force in England, as indicated above, until 1535. In that year the famous Statute of Uses was enacted.[6] This statute was intended to remedy the evils growing out of the system of uses and trusts. These evils were, in part, that the real ownership of land was concealed by the use, that wives were defrauded of their dower and husbands of their curtesy because there was neither dower nor curtesy in the interest of the cestui que use, that the feudal landlords were deprived of their special privileges, since the equitable interest of the beneficiaries was not subject to these feudal claims, and that creditors suffered because they could not obtain payment of their debts out of the equitable interest of the beneficiary. The use and trust were employed to accomplish fraud.

The Statute of Uses provided, in effect, that, whenever A should be given real property to the use of, or in trust for, B, the legal title to the land should pass from A to B and B should become the legal owner of the property as if no use or trust had been sought to be created. Thus, the statute aimed at abolishing entirely uses and trusts in order to do

[5] Bacon, Uses, pp. 8, 9.

[6] 27 Henry VIII, chap. 10.

away with the fraud which they had caused. It sought to render all estates in land legal estates. According to the phrase of the time, the statute "executed the use," that is, transferred the legal title to the cestui que use, the person who was before the holder of a mere equitable right, a use.

7. **The effect of the Statute of Uses.**—The Statute of Uses was construed by the courts in such a way that it did not accomplish the object which the framers of it had in mind. It was held, for reasons which it is impossible here to detail, not to apply to a number of uses and trusts, namely, among others, to uses in estates for years, to active or special uses and to a use upon a use. Thus, if the conveyance were to A "to the use of B for ten years," or to A "to collect the rents and pay them to B," or to A "to the use of B to the use of C," the courts held that the statute did not affect the use or trust, but that it remained a right enforcible in the court of chancery.[7] In these three cases, and in other instances, there was still a division of the legal and equitable title, and something in the nature of a use or trust existed. These equitable interests, held not to be destroyed by the Statute of Uses, were called trusts by the court of chancery. The word use was avoided, possibly because it was thought that to recognize the right as a use would be to encourage another act to abolish uses. The word trust was a general term employed before the Statute of Uses, and it was, after the statute, applied to those uses

[7] Ames, Origin of Uses and Trusts, Select Essays in Anglo-American Legal History, vol. 2, p. 737.

and trusts which survived the statute. Thus the trusts which form the subject of this study are the uses and trusts which survived the Statute of Uses and which have since been classed together by equity as trusts.

8. **American system of trusts taken bodily from the English.**—Prior to 1800 transactions with respect to land in the American states were simple. Large fortunes were few. There was little need for the trust. No system of equity jurisprudence worth mentioning had been developed. By the year 1800 the English law of trusts had become well developed and mature. Hence, when courts of chancery were created in the American states and the need of a system of trusts was recognized, the English system was adopted bodily. While numerous statutory changes have taken place since that time, the English law of trusts forms the base upon which the American system rests.[8]

[8] Story, Equity Jurisprudence, vol. 1, §§ 56-58.

CHAPTER II.

TRUSTS DISTINGUISHED FROM OTHER RELATIONSHIPS.

9. **Debt.**—A debtor differs from a trustee principally with respect to the subject-matter of his obligation. The subject-matter of a debt is any money out of the debtor's assets. The subject-matter of a trust is a certain, specific piece of property. One is indefinite, the other definite. A bank receiving an ordinary deposit becomes the debtor of the depositor and satisfies its duty by returning any money. It does not need to set apart the particular bills left by the depositor. On the other hand, a bank receiving bonds to hold, collect the income therefrom and pay it to A may become a trustee of them, and, if so, it must keep separate the particular bonds thus delivered to it.

This distinction often becomes important because a debtor is not discharged by the accidental loss of any particular property, while a trustee is relieved from his obligation to return the subject-matter of the trust if it is lost without his fault. And likewise a creditor must, in case of his debtor's bankruptcy, share equally with all other creditors, while a beneficiary of a trust is entitled to the exclusive benefit of the trust property.

The two relationships differ also as to the methods of enforcement. A creditor sues his debtor in a court

of law to recover the amount of the debt. A beneficiary brings a bill in equity to compel the trustee to perform his trust duties.[9]

10. **Bailment.**—"A bailment is the transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the property is to be redelivered or delivered over to a third person."[10] The person to whom the property is delivered is called a bailee. A warehouseman receiving goods for storage is a bailee, and so also a jeweler with whom a watch is left for repair. This relationship is like a trust in that both bailee and trustee owe a duty to use care with respect to the property in their charge, but unlike a trust because bailment deals with personal property alone and is in the nature of the claim which the custodian has against the property in his possession. A trustee is the legal owner of the subject of the trust. A bailee is not the owner of the thing bailed, but merely entitled to its possession for a certain time.

There is a further distinction, arising from the one last mentioned, with respect to the remedies available to bailor and beneficiary. For example, the depositor of goods with a warehouseman, if the goods are not returned when demanded, sues the warehouseman in a court of law and obtains judgment that he recover possession of the goods deposited. His remedy is against the goods, so to speak.

[9] People v. City Bank of Rochester, 93 N. Y. 582, LEADING ILLUSTRATIVE CASES; People v. Bank of Dansville, 39 Hun 187 (N. Y.), LEADING ILLUSTRATIVE CASES.

[10] Hale, Bailments and Carriers, pp. 5, 6.

Whereas, the remedy of a beneficiary of a trust, for a failure by the trustee to manage the trust property according to its terms, is an action in a court of equity in which he obtains a judgment against the trustee personally that he do or refrain from doing certain acts with respect to the trust property. His remedy is against the person.[11]

11. **Equitable charge.**—If A devises (that is, leaves by will) land to B, subject to a duty on B's part to pay C $100 a year, an equitable charge is created. If A devises land to B in trust to pay to C $100 a year, a trust is created. In both cases C receives an annual benefit of $100 and B receives land, but the transactions are distinguishable. The principal distinction lies in the nature of B's ownership of the land. In the case of the charge B is the absolute owner of the land, both at law and in equity, although C may, by a bill in equity, compel a sale of the land to satisfy his charge, if necessary. On the other hand, as a trustee B owns the land absolutely only in a court of law. In a court of equity, C is the owner of the land to the extent necessary to produce $100 a year. In the first instance B holds the land subject to a particular purpose. In the second, he holds for a particular purpose.[12]

Similarly, the relationships are distinguished upon the element of personal confidence. A trust implies a fiduciary relation. The trustee cannot substitute another in his place by a sale of the trust property. A charge implies no fiduciary relation. The right is

[11] Ashley's Adm'rs v. Denton, 1 Litt. 86 (Ky.), LEADING ILLUSTRATIVE CASES.

[12] Pomeroy, Equity Jurisprudence (3d ed.), note, § 1033.

against the property and the owner of the property may transfer it at will, subject to the charge.[13]

12. **Assignment of a chose in action.**—A chose in action is the "right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action."[14] For example, a promissory note is a chose in action. In all jurisdictions before recent statutory changes, and in some states yet, one buying or taking an assignment of a chose in action could not enforce it in his own name, but must sue in the name of the original owner, his assignor. The situation of the assignee of a chose in action in states maintaining this rule bears some resemblance to that of a beneficiary of a trust of a chose in action. The assignor is in some respects like a trustee. He is the legal owner of the chose in action, while the assignee is in all justice entitled to the avails of it. But the assignee's remedy to obtain the avails is not in equity, as a beneficiary's would be, but is at law by a suit in the assignor's name, except in unusual circumstances.[15] And the assignor, while holding the legal title, has no duty except a negative one, namely, not to interfere with the collection by the assignee. A trustee, of course, always has some duty, if it be no more than to deliver the property to the beneficiary.

13. **Executorship.**—An executor is the person appointed by will to collect the personal property of the deceased, pay the debts and funeral expenses

[13] King v. Denison, 1 Ves. & B. 260, 272 (Eng.).

[14] Bouvier, Law Dictionary, p. 265.

[15] Walker v. Brooks, 125 Mass. 241.

and distribute the remainder as directed in the will. The executor is like a trustee appointed by will in that he is in a relation of trust and confidence, that he is the legal owner of the personal property which the deceased has left, that certain definite property is in his charge and that he owes a duty to use care with respect to the management of the property.

But the executor differs from the testamentary trustee (that is, trustee appointed by will) in the nature of his duties of administration, the nature of the claim against him and the court in which he may be held to account. The executor has only the duties mentioned in the definition above and never any duties of investment or long continued management. If he is to invest and manage for the benefit of others, he is, with respect to those duties, a trustee. The legatee, who is entitled to claim the property finally from the executor, is, during the executor's term, in no sense the owner of the property, whereas a beneficiary of a trust is, in a certain sense, the equitable owner of the subject-matter of the trust. Probate courts have jurisdiction over executors, whereas trustees are made responsible in a court of equity. The same person may be made both executor and trustee. In that case his duties are separate. Theoretically he collects the money as executor and then pays it to himself as trustee. When an executor ceases to be such and becomes a trustee is often a difficult question to decide.[16]

14. **Agency.**—An agent does not own the prop-

[16] Ames, Cases on Trusts (2d ed.), note, p. 73; Drake v. Price, 5 N. Y. 430, LEADING ILLUSTRATIVE CASES.

erty with which he deals. He may have the possession and management of property for the purpose of selling it, or transporting it from place to place, or doing work upon it. But he never owns the property as a trustee does. The agent is merely a tool or representative of his principal, while the trustee owns the trust property, subject to certain equitable rights in favor of the beneficiary. "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.'"[17] But agency in its present state of growth has little in common with the trust. Agency is a common law topic, while the courts of equity have jurisdiction of trusts.

15. **Guardianship.**—Courts of probate appoint guardians (or committees, as they are called in some states) for infants and persons mentally incompetent. The guardian is often said to bear the relation of trustee to the infant or incompetent, but he is not a trustee in the technical sense. The guardian has merely possession and control of the ward's property and not ownership. The relation is fiduciary in the sense that the guardian owes to the ward the utmost good faith and, like a trustee, cannot buy the property from the person whose interests he is supposed to protect. But the guardian has not the legal ownership of the property concerned which characterizes a trustee. Guardianships are dealt with in courts of probate and trusts in equity.[18]

[17] Pollock & Maitland, History of English Law, vol. 2, p. 226.

[18] Rollins v. Marsh, 128 Mass. 116, 118, LEADING ILLUSTRATIVE CASES.

CHAPTER III.

THE CREATION OF EXPRESS TRUSTS.

16. **Definitions and division of the subject.**—Having considered in the two preceding chapters the history of trusts and the distinctions between them and other similar relationships, it is next essential to discuss the methods by which trusts are created. Trusts are divided with respect to their origin into two classes, express and implied. An express trust is one based upon a written or oral statement of its creator to the effect that it is his intent that a trust shall arise. An implied trust is one created by a court of equity because of the acts or situations of the parties. It is not actually intended by them. Implied trusts are divided into two classes, resulting and constructive trusts. A resulting trust is a trust implied by law for the purpose of working out what the law considers was the presumed intention of the parties, but what was not their actually expressed intent. A constructive trust is a trust implied by law for the purpose of working out justice between the parties, regardless of their intention. Thus, if A writes out a deed by which he transfers land to B to hold in trust for C, using the words trust, trustee and beneficiary, or their equivalents, the trust is express. While if A pays for land the title to which is taken in the name of B, a resulting trust is created by law, with B as a trustee and A as a

beneficiary. And if A, while a trustee of certain land for B, buys it in for his own benefit upon a sale, a constructive trust is created by law to prevent possible fraud, and A will, if B desire, after the sale, hold the land as a constructive trustee for B. In the two illustrations last mentioned, the parties did not use the words trust, trustee or beneficiary, yet their acts were such that the courts implied a trust, in the first instance because it was presumed that the payor of the consideration must have intended to get the benefit of the land purchased with his money, and in the latter instance because it might encourage fraud to allow one in a confidential situation like that of a trustee to buy the subject of the trust.

First will be considered the acts and formalities necessary to create an express trust, and later will be discussed the cases in which courts of equity raise implied trusts.

17. **Language necessary to create an express trust.**—Any words may be used so long as they contain a complete statement of the essential terms, namely, a description of the property which is the subject-matter, the trustee, the beneficiary and the trust purpose. If no trustee is named, the court will supply that defect. It is unnecessary that the words trust, trustee or beneficiary or any technical legal words be used, and the use of such words will not necessarily give rise to a trust. The all important requirement is that the words used shall show an intent to make someone the holder of certain property for the benefit of another.

18. **Precatory expressions.**—The questions of

most difficulty in relation to the sufficiency of language to create a trust arise in connection with what are called "precatory expressions." A precatory expression is a statement of entreaty, request or recommendation. Thus, if A leaves property to B by will and then states in his will, "I request B to make a provision from this property for the needs of C so long as he lives," the expression quoted is precatory. The difficult question is, does the will give B the property absolutely, so that he can do what he wishes with it and care for or neglect C as he likes; or does the will make B a trustee of the property for C, so that it is B's legal duty to make a reasonable provision for the needs of C from the income or principal of the property? The courts answer this question by seeking to learn what was the intent of the maker of the will. That intent controls. No two cases upon this subject are alike and often apparently inconsistent decisions are found.[19] Thus in one case[20] the provision "I give, devise and bequeath all my real and personal property and effects unto my daughter, Frances Edmondson, * * * and it is my desire that she allows to my relative and companion, Anne Gregory, now residing with me, an annuity of £25 during her life," was held not to create a trust. While in another case[21] the words "I direct my wife, Amelia A. Scranton, out of the property hereinafter given and bequeathed to her by this will, to use so much thereof for the support and

[19] Ames, Cases on Trusts (2d ed.), notes, pp. 82, 87, 93, 97; Phillips v. Phillips, 112 N. Y. 197, LEADING ILLUSTRATIVE CASES.

[20] In re Diggles, 39 Chancery Div. 253 (Eng.).

[21] Collister v. Fassitt, 163 N. Y. 281.

benefit of my niece, Georgie S. Collister, as my said wife shall from time to time think best so to do," were held to create a trust.

The relation of the parties, the amount of the property involved and the other provisions of the will are among the facts which the courts consider in determining the testator's intent. The disposition of the early English cases[22] to construe practically all precatory expressions as creating trusts has not met with favor in the decisions in England and America since 1800. Such expressions are now given merely a natural interpretation.

19. **Formality necessary to create a trust.**—At common law (that is, before the enactment of any statutes upon the subject) it was possible to create a trust in real or personal property by parol (that is, orally). So long as the words used showed an intent to create a trust, it was not necessary that they be reduced to writing. This is now the rule in a few American jurisdictions.[23]

20. **The Statute of Frauds.**—But it soon became evident that to allow the creation of trusts in land by word of mouth was to encourage fraud and perjury. Hence in 1677 the English Parliament included in the famous Statute of Frauds[24] §§ VII, VIII and IX, which were designed to require written evidence of the creation of trusts in land.[25] This statute has

[22] Malim v. Keighley, 2 Ves. Jr. 333 (Eng.).

[23] Ariz., Del., N. M., Oh., R. I., Tenn., Tex., Va., and Wyo. See Ames, Cases on Trusts (2d ed.), note, p. 176.

[24] 29 Car. II, chap. 3.

[25] "VII. And be it further enacted by the authority aforesaid, That from and after the four and twentieth of June all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be

been copied, with some variations, by the great majority of American states.[26] It should be noticed that this statute has no reference to trusts of personal property. Hence such trusts may everywhere be created and proved by parol.[27] Furthermore, it is important that the statute does not affect implied trusts, that is, those arising by operation of law. Thus, if A pays the purchase price of land which is conveyed to B, an implied trust will be raised and B declared a trustee of the land for A, irrespective of whether there is any written evidence upon which to base the trust. It is only express trusts to which the statute applies. The effect of failure to supply the written evidence of the creation of the express trust is not to make the trust void and of no effect, although the statutes frequently so state. The word "void" has universally been construed to mean "voidable." The parties may carry out the trust if they desire, but cannot be compelled in a court of law to enforce the trust unless it is evidenced by a writing.

manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

"VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

"IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect."

[26] Ames, Cases on Trusts (2d ed.), note, pp. 176-178.

[27] Hon v. Hon, 70 Ind. 135.

21. **What writing will satisfy the Statute of Frauds.**—The writing must contain a statement of the elements of a trust, the subject-matter, trustee, beneficiary and purpose. That is, it must be a complete statement. Otherwise the words used are unimportant. The writing required is not necessarily one made at the time the trust is created. It is merely a writing manifesting or proving the trust. Hence it may be made at the time of the creation of the trust or at any time thereafter. It cannot ordinarily be made before the trust is created. The intent with which the writing is made is unimportant.[28] It may be made for the purpose of furnishing evidence of the trust, or for the purpose of repudiating the trust, or for no purpose connected with the trust. It may be addressed to the beneficiary or the settlor of the trust or to a stranger to the trust. It may be a letter, a deed, a pleading in an action, a receipt, a contract or an affidavit. The essential thing is that it be written evidence that the person signing it admits that he holds the real property in trust for another. Two or more writings may be used together, although neither one alone contains a full statement of a trust, if they are both signed by the proper party or if one is so signed and refers to the other in such a way as to incorporate that other in the signed writing.[29] The original English statute and most of the American statutes require merely a "signed" writing, that is, one in which the signature appears at any place in the writing. But a few

[28] Bates v. Hurd, 65 Me. 180, LEADING ILLUSTRATIVE CASES.
[29] Loring v. Palmer, 118 U. S. 321.

American states[30] have made the requirement of a "subscription," that is, a signing at the end of the document. The signing or subscribing must be "by the party who is by law enabled to declare such trust." This means the owner of the property at the time the writing is made, who is ordinarily the trustee. Thus, if A convey land to B upon an oral trust to hold for C, the trust will be unenforcible as an express trust after B acquires title, unless there is a writing signed or subscribed by B.

22. **Trusts created by will.**—The Statute of Wills, enacted in England in 1540,[31] required wills of real property to be in writing, and the Statute of Frauds, referred to in the next preceding section, made added requirements with respect to the signature by the testator and attestation by witnesses. Similar statutory provisions, applicable to wills of both real and personal property, are in force generally in the American states. Hence trusts created by will must meet an additional requirement as to formality. The instrument by which it is attempted to create them must be executed in accordance with the statutes respecting wills, and if not so executed, the trusts, the creation of which is so attempted, cannot take effect as express trusts.[32] As will be seen from the subsequent discussion in this article, these unsuccessful attempts to create express trusts may cause equity to create implied trusts for the purpose of working out justice. The will may, although not

[30] Calif., Colo., Ida., Mich., Minn., Mont., Neb., Nev., N. Y., Ore., Utah, Wis. Ames, Cases on Trusts (2d ed.), note, p. 179.

[31] 32 Henry VIII, chap. 32.

[32] Thayer v. Wellington, 9 Allen 283 (Mass.).

executed with sufficient formality to take effect as a will, operate as evidence of a trust previously created, of which the would-be testator was a trustee. This does not give the will any effect in creating a trust, but merely in proving one previously created.

23. **When is consideration necessary?**—Is it necessary that a trust should have been created because of some benefit conferred upon the settlor or some detriment suffered by the beneficiary? If A conveys land to B in trust for C, is it sufficient to make the trust enforcible that A entertained good will toward C and wished to benefit him, or is it necessary that C, in order to enforce the trust, should show that he has paid money to A or that he (C) has released A from a debt? If the trust is really a trust, that is, if it is completely created, it is immaterial whether it is based upon consideration or is voluntary (that is, without consideration).[33] Thus, if A perform all the acts necessary to make himself a trustee for B, or if A perform all the acts necessary to make X a trustee for B, it is no objection to the validity of the trust that A received no benefit in return for the creation of the trust. What are such acts necessary to the completion of a trust has been partially discussed above under the subjects of the Statute of Frauds and the Statute of Wills, and will be more fully discussed in the sections immediately following. But if A, the owner of property, does not create a trust in favor of B, but merely agrees to create one in the future, or if A attempts to create a trust in favor of B, but does not do all the acts necessary to such creation, or

[33] Massey v. Huntington, 118 Ill. 80.

does some of such acts defectively, then A cannot be compelled by B to create the trust or to complete his creation of the trust, nor will B have any rights to the trust property, unless consideration has been given to A.[34] This is upon the principle that equity will not aid a volunteer (that is, a person claiming something for nothing). If A has completely transferred title to B in trust for C, then it would be an unjust enrichment of B to allow him to hold the property for his own benefit and to fail to enforce the trust, even though C gave nothing for the trust. But if A is still the owner of the property, there is no unjust enrichment of anyone in allowing him to keep it, even though he has agreed to become a trustee of it for B, as long as B has not changed his position as a result of that promise.

The essential of a voluntary enforcible trust is that all the acts which the settlor is capable of doing toward the creation of the trust be done. Hence if the trust is incomplete merely because it is necessary that some one other than the settlor, as, for instance, the trustee, perform an act, the trust will be enforcible though voluntary. And, similarly, equity will not create a trust in favor of a volunteer when there has been no promise or attempt by A to create a trust for B, but merely an attempt by A to give the property to B, which attempt has failed. A gift is not valid unless it is effected by a sealed instrument or unless it is accompanied by delivery of the thing given. If neither of these essentials is present, equity will not make a trust out of the

[34] Matter of James, 146 N. Y. 78.

transaction. There is no reason for aiding the volunteer in such a way. He will be in no worse condition if the gift is not carried out than he was before it was attempted.

The better rule is that the consideration which must exist, when consideration is necessary for a trust, is what is called "valuable" consideration (that is, a property consideration), and that "good" or "meritorious" consideration (that is, one founded on relationship or affection) is not sufficient. While a seal at common law raises a presumption of consideration, the tendency of American courts and legislatures has been to do away with the effect and necessity of a seal and the better rule is that a seal is not consideration sufficient to support a trust when consideration is necessary.[35]

24. **The transfer of the property—(a) The owner makes a third person trustee.**—The very definition of a trust includes the idea that the trustee is the holder of the legal title. Hence it is elementary that where A is the owner of real or personal property and desires B to become the trustee of it for C, A must transfer the legal title to B. How this title can be transferred is more a question of conveyancing than of trusts.

If land is to be the subject-matter of the trust, title to it can only be transferred to the trustee by a written, and in some states, by a sealed instrument executed by the grantor and delivered to the grantee. If personal property is to be the subject-matter of the trust, title to it may be passed by a

[35] Perry, Trusts (6th ed.), §§ 107, 109, 111.

mere delivery of the property itself to the trustee, subject, however, to the provisions of the Statute of Frauds with respect to the sale of goods. The settlor must do every act which is necessary under the law of conveyancing, sales or gift, depending upon the nature of the property and the existence of consideration, to pass the title to the trustee. Only then will the trust be created. But the settlor may not hold the legal title to the property which he wishes to make the subject of the trust. For instance, A, the beneficiary of a trust, may desire to pass his interest as a beneficiary to B to hold in trust for C. A's title here is an equitable one. The rule, as stated above, must then be qualified to the effect that the settlor must do all that is necessary on his part to pass his title, whether legal or equitable, to the trustee. Hence in the illustration last given, A could create a trust in his equitable interest by an assignment to B, and no act on the part of A's trustee or settlor would be necessary.[36]

In states where a chose in action is not assignable, the question of the ability of an owner of such property to create a trust therein has arisen. Suppose A is the owner of a note given to him by B, can A make X the trustee of this note for Y? A cannot, in these jurisdictions, transfer the legal title in the note to X, and for that reason some courts have thought such property incapable of being the subject of a trust. But the better view is that A may transfer to X the power to collect the note in A's name, and that

[36] Sloane v. Cadogan, Sugden, 3 Vendors and Purchasers (10th ed.), Appendix, 66.

that power may be the subject of the trust in favor of Y.[37]

25. **Same subject—(b) The owner makes himself a trustee.**—If the owner elects to be the trustee himself, it is obvious that the requirement cannot be made that the settlor pass to the trustee the legal estate in the subject of the trust. The settlor already has the legal estate. Settlor and trustee are one person. The sole question then is, what evidence will the courts require that A, who has formerly held certain property for his own benefit, has now come to hold it as trustee for the benefit of A, beneficiary? The so-called "savings bank" trusts are peculiar and will be treated separately in § 27, post. With respect to other trusts the evidence must first meet the requirement of the Statute of Frauds if the property be real, that is, the evidence must be written and signed by the person enabled to declare the trust. With this exception, no particular kind of evidence is required. The sole requirement is that it clearly appear that the owner of the property intended to assume the character of a trustee. If he executes a written declaration of the trust, he need not deliver this to the beneficiary, or to anyone, but may keep it in his own possession. However, the fact that the settlor and trustee keeps the written instrument secret and in his own possession will, of course, have some probative force as showing a lack of intent to create a complete trust. All the acts of the alleged settlor and trustee with respect to the property and the beneficiary are to be considered and the question

[37] Perry, Trusts (6th ed.), § 101.

then asked and answered, "Does this evidence show clearly that the owner of the property intended to become a trustee?"[38]

26. **Are notice to and acceptance by the beneficiary necessary?**—If A deeds land to B in trust for C, or if A declares himself a trustee of land for C, is it necessary, in order that the trust be complete, that C should be notified, at the time of its creation, of the existence of the trust? It is not, and C may enforce the trust when he does learn of it, even though he was ignorant of its existence at the time of its creation and for long thereafter. In the same way, unless the trust has fastened to it burdensome conditions, it will be presumed that the beneficiary accepts it and no affirmative proof of his acceptance need be shown, in order to prove the complete creation of the trust.[39] The trust being of advantage to the beneficiary, the law presumes that he accepts it. But the absence of notice to the beneficiary will always, of course, be evidence upon the question whether the settlor intended to create a trust, and may, coupled with other facts, show that there was no complete trust.

27. **When are savings bank trusts completely created?**—The peculiarity of the law with respect to this class of trusts renders it advisable to consider separately the acts necessary to their creation. If A deposits his own money in a bank and, by A's direction, the account is entitled "A in trust for B,"

[38] Fowler v. Gowing, 152 Fed. 801, 807; Phipard v. Phipard, 55 Hun 433 (N. Y.).

[39] City of Marquette v. Wilkinson, 119 Mich. 413; Perry, Trusts (6th ed.), § 105.

the question arises whether a trust for B is really created because of this deposit, or, if not from this bare deposit, what further acts are necessary to complete such a trust. It might at first, naturally be supposed that A's direction that the deposit be placed in his name as trustee for B on the books of the bank would be a sufficient declaration to form a complete trust. But, due to various business reasons, the courts have considered such a deposit as insufficient of itself to create a trust. Savings banks sometimes pay a higher rate of interest on small deposits than on large ones. They sometimes refuse to receive deposits in one name above a certain amount. Depositors often desire to conceal their financial condition for the purpose of avoiding taxation or because of modesty. For these and other reasons there is an advantage to a depositor in dividing his deposits and placing part of his money under the name of another or under his own name in trust for another. And hence the taking out of a deposit as trustee for another does not have the clear and unequivocal meaning that is attached to the ordinary statement that one is trustee for another.

Whether A, by depositing money in an account entitled "A as trustee for B," creates a trust is a question of A's intent. A could create such a trust and he could make such a deposit without creating a trust. How is A's intent to be learned? In the first place, it may be learned by what he has said about his intent. If A clearly declares, orally or in writing, at or before the time the deposit is made, that he intends to create a trust for B by the deposit,

then such a trust will arise.[40] But a statement by A, after he has made a deposit entitled in trust for B, that he did not intend to create a trust by such act but that the money is deposited solely for A's benefit, will not be received in evidence.[41]

However, it may be that A has made a deposit entitled in trust for B without saying a word as to his intent, except that he wanted the deposit to run in trust for B. How, then, is A's intent to be learned? It will be gathered from the acts of A with respect to the deposit, aside from words. The bare act of deposit creates what the courts have called a "tentative" trust, that is, one which is established temporarily subject to destruction or confirmation as the later acts of the depositor may determine. But the deposit alone creates no trust. Upon that all the courts are agreed. The name "savings bank trusts" is applied to these trusts because their subject-matter is usually a claim against a bank of that kind, but the same rules would be applied to deposits made in other banks.

28. **Same subject—Continued.**—If the depositor die without having withdrawn the money or done any other act concerning the deposit, the courts are divided as to the result. The New York rule, followed in a majority of states, is that, by his failure to withdraw the money during his life, the depositor makes the trust complete.[42] The tentative trust seems to be confirmed or made complete by a "nega-

[40] Merigan v. McGonigle, 205 Pa. St. 321.
[41] Tierney v. Fitzpatrick, 195 N. Y. 433.
[42] Martin v. Funk, 75 N. Y. 134.

tive act." But the Massachusetts rule is that no trust is created by the deposit and death of the depositor without change in the deposit. Notice of the existence of the trust must be given to the beneficiary or some other act done to show intent. In the language of Judge Holmes, "An owner of property does not lose it by using words of gift or trust concerning it in solitude, or with the knowledge of another not assuming to represent an adverse interest. He may amuse himself as he likes."[43] Under this rule, however, no notice to the beneficiary need be given, if A has delivered the bank book to B or his representative.[44]

If the only act shown is the deposit by A as trustee for B, and B dies with the account standing as when the deposit was made, then the general holding is that the tentative trust is destroyed and A owns the account absolutely. There is no act of confirmation, and failure to notify the beneficiary before his death is deemed a revocation of the trust.[45]

If the acts shown are the deposit by A as trustee for B and notice given to B by A of the existence of the deposit in this form, then it is universally held that the tentative trust is made complete and irrevocable.[46] Notice given, not to the beneficiary, but to a third person, would, in states following the New York view, be evidence to be considered as

[43] Cleveland v. Hampden Sav. Bk., 182 Mass. 110, 111.

[44] Peck v. Scofield, 186 Mass. 108; for a collection of the authorities following the New York and Massachusetts rules, respectively, see 1 Perry, Trusts (6th ed.), p. 87.

[45] Cunningham v. Davenport, 147 N. Y. 43.

[46] Farleigh v. Cadman, 159 N. Y. 169, LEADING ILLUSTRATIVE CASES.

tending to show a completion of the trust, but in states following the Massachusetts theory notice to a third person would have no effect unless the third person represented the beneficiary.[47]

If the acts shown are deposit by A in trust for B and a delivery of the pass book to B or his representative, then the authorities are all to the effect that the tentative trust is made complete and irrevocable by such delivery.[48] And, after such delivery, a return of the book to A by B will not necessarily destroy the trust.[49]

If the only acts shown are the deposit by A in trust for B and withdrawals from the fund by A for his own use, then the trust is still tentative and A may lawfully make such withdrawals until the fund is exhausted. But if A does any act which confirms and completes the trust, such as delivery of the book to B or notice of the trust to B, then withdrawals from the account for A's benefit are unlawful and, if any are thereafter made, they have no effect on the trust. A will be responsible for the amount in the fund at the time the trust becomes complete.[50] A reservation by A of the right to withdraw from the account any part of the principal or interest during his life does not prevent the tentative trust from becoming complete and irrevocable as to the part not withdrawn by the performance of acts showing

[47] Mabie v. Bailey, 95 N. Y. 206; Cleveland v. Hampden Sav. Bk., 182 Mass. 110.

[48] Peck v. Scofield, 186 Mass. 108.

[49] Stockert v. Dry Dock Sav. Inst'n., 155 N. Y. App. Div. 123.

[50] Mabie v. Bailey, 95 N. Y. 206; Farleigh v. Cadman, 159 N. Y. 169, LEADING ILLUSTRATIVE CASES.

an intent to confirm it, such as notice or delivery of the book.[51]

If the depositor add money to the fund in the bank standing in the name of A as trustee for B, the money added takes on the character of the money already there. If the trust was tentative when the second deposit was made, the second deposit merely adds to the original tentative trust fund. If the trust had been completed and confirmed when the second deposit was made, the second deposit becomes an irrevocable trust fund also.

The prevailing view of these trusts is summed up in the following condensed statement by the New York Court of Appeals: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."[52]

29. **Acceptance by trustee unnecessary to creation of trust.**—No man can be compelled to accept a conveyance of property, whether in trust or for his own benefit. Hence if A convey land to B to hold

[51] Booth v. Oakland Bank of Savings, 122 Cal. 19.

[52] Matter of Totten, 179 N. Y. 112, 125, 126.

in trust for C, and B is not desirous of undertaking the trust, B may decline it and he will not become a trustee. But his refusal to act will not prevent the trust from being completely created. B will not become a trustee, but someone else will. Equity never allows a trust to fail for want of a trustee. Therefore, a court of equity will, if a trustee appointed by will or deed refuse to act, appoint a substitute.[53] As between the settlor and the beneficiary, the trust will be completely created as soon as the acts named above as essential have been performed, regardless of acceptance or refusal by the trustee named. And the same rule is applied if the trustee named be legally incapable of acting. For example, if a corporation named in a trust deed have no power under its certificate of incorporation to act as such trustee, the trust deed will not for that reason be invalid. Equity will appoint a substitute.[54]

[53] Braswell v. Downs, 11 Fla. 62.
[54] Willis v. Alvey, 69 S. W. 1035 (Tex.).

CHAPTER IV.

THE CREATION OF IMPLIED TRUSTS.

30. **Scope of this chapter.**—In the chapter immediately preceding the creation of so-called express trusts has been considered. Such trusts are created because of the intent of the settlor that a trust arise, expressed by written or spoken words. But there is a large class of trusts called implied trusts which are created by the courts because the parties have done certain acts or are in certain situations. While such trusts could not arise without some acts by the parties, it is essentially the decree of the court which creates the trust. These implied trusts have previously been defined as divided into two classes, resulting (arising from presumed intent) and constructive (created to work out justice). The conditions of origin of each of these classes of implied trusts will be considered in the order named. It is important to remember two facts with respect to these implied trusts. First, they are created and proved irrespective of the Statute of Frauds. It is unnecessary that there be any written evidence of an implied trust, whether it be concerned with land or personalty. This is because of the express exception of the Statute of cases "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law."

Secondly, the effect of the creation of an implied trust should be noticed. The person declared a trustee by the court is under a duty to convey the trust property to the beneficiary. The trustee of an implied trust has no duties. He merely holds for the beneficiary until he delivers the property to him. The effect is the same, whether the trust be resulting or constructive. Hence the only reason for distinguishing these two classes of trusts is one of theory and the courts often use the names resulting and constructive interchangeably.

31. **Resulting trusts—Class I: Conveyance without consideration.**—"All resulting uses or trusts will be found to be some variation of this principle, viz., that one is presumed not to be a donor of property conveyed or caused to be conveyed by him."[55] Prior to the Statute of Uses, if A owned land and conveyed it to B by one of the conveyances then in vogue, and the conveyance did not declare that B held the land for the use of another and mentioned no consideration as having been paid for it, the court of equity would declare that a use "resulted" to A. This was because it was so common at that time to hold land to the use of another that the courts presumed that every conveyance was upon a use, and the natural presumption in the case supposed would be that, if any use were to be declared, it would be in favor of A, the person who had conveyed the land to B and obtained nothing for the conveyance. After the Statute of Uses this same situation gave rise to a

[55] H. F. Stone, Resulting Trusts and the Statute of Frauds, 6 Columbia Law Review, p. 326, 329.

resulting trust. This was the original resulting trust and was based on the presumption that a man will not give away his property. Of course, the presumption of a resulting trust could be overcome by the grantee. He could prove that he had paid consideration or that he was to hold for his own benefit, but the burden was on him. The form of the conveyance raised a presumption of a trust which the presumed trustee had to overcome.

In the later history of the English common law, this form of a resulting trust became less important. The holding of land to the use of, or in trust for, another became less common and there was less room for a presumption that every conveyance was to the use of another than the grantee. Furthermore, the form of the conveyances in force changed and the old common law conveyances were displaced by conveyances operating under the Statute of Uses (bargain and sale and lease and release) and in these conveyances there was always a statement of consideration paid or of the use to which the land was to be held. Hence under these modern conveyances there is rarely, if ever, an opportunity for the presumption of a resulting trust on this ground.[56] The conveyance usually shows by its statement of consideration, which is not capable of contradiction, that the grantee is to be a holder for his own benefit, and it also generally contains a statement that the grantee is to hold for his own use or the use of a third person, which leaves no opportunity for a presumption of a trust in favor

[56] Lovett v. Taylor, 54 N. J. Eq. 311; 1 Perry, Trusts (6th ed.), § 162.

of the grantor. For these reasons trusts of this kind are practically obsolete.

Voluntary conveyances (that is, conveyances without consideration) to a wife or child of the grantor were never within this class of resulting trusts, even though no use was declared. They were governed by another principle, namely, that a voluntary conveyance to a relative of that kind was presumed to be a gift because of the duty which a husband or father has to support his wife or child.

32. **Same subject—Class II: Imperfect or illegal declaration of trust.**—If A convey by deed, or devise or bequeath by will, without any consideration, real or personal property to B in trust, and the beneficiaries of the trust are not named, or are named as to only part of the property, or the beneficiaries named are incapable of taking, or the purpose of the trust is illegal, or for any other reason the trust declared fails in whole or in part, a trust results as to the property thus undisposed of in favor of the settlor, if alive, or his successors, if he be dead. If the property be real property, the trust results in favor of the heirs of the deceased settlor; if personal property, in favor of the next of kin.[57] Thus if A, without consideration, convey land to B in trust to collect the rents and profits from one-half thereof and pay them to C during his life, and no direction is given with respect to the rents and profits of the other one-half, a trust will result in A's favor as to such one-half and it will be B's duty to reconvey one-half the land to A. Or if A by will, without consideration,

[57] Nichols v. Allen, 130 Mass. 211; 1 Perry, Trusts (6th ed.), § 160.

bequeath $10,000 to B in trust to manage for the benefit of C, and because of a violation of the statutes of the state concerned, the trust is invalid and cannot lawfully be enforced, a trust will result in favor of the next of kin of A, and B will be directed to pay to them the $10,000.

In both cases supposed, B has the legal title to property for which he has paid nothing. It would be unjust to allow him to hold for his own benefit the property which is undisposed of, or which is unlawfully disposed of. It is not to be presumed that such would have been A's intent had he realized that the trust created did not include all the property given or would be unenforcible. It is rather to be presumed that A intended that any property which the trustee, B, held subject to no lawful direction from the trust instrument, should benefit A, if living, or A's heirs or next of kin, if A be dead. Out of this presumed intent of A, equity creates a resulting trust.

It will be seen that the principle underneath this class of resulting trusts is the same as that which is the basis of the resulting trusts of the first class. In both cases the owner of property has made a gratuitous transfer of it to another in circumstances which make it fair to presume that that other should not be the owner of the property for his own benefit. A man is presumed not to give away his property. The presumption which existed in class I has now been destroyed for reasons mentioned above. The presumption existing in class II is still active and plays an important part in the

decision of cases involving imperfect trusts or trusts void because violative of the rule against perpetuities or other provisions of law.

If the trust in question be a charitable trust and fail, not because of the invalidity of charitable trusts in general, but because of the imperfect directions used to create this trust, ordinarily a resulting trust will not arise for the settlor or his successors, because equity will apply what is known as the *cy pres* doctrine and administer the property for some charitable purpose as near that of the settlor as possible. This rule will be discussed in the chapter on the purposes of public trusts.

If the testator after creating an invalid or imperfect trust, leave all the rest, residue and remainder of his property which is not disposed of otherwise to X, then there is no room for a resulting trust in favor of the testator's successors, because the subject-matter of the void or imperfect trust has been given to X under what is known as the residuary clause of the will.[58]

If the settlor direct that real property, the subject of the void or imperfect trust, be sold and converted into money, a trust will result in favor of the settlor's next of kin, because in the eye of equity the land is changed to personal property, though it has not actually been sold. This is called the doctrine of equitable conversion. And so, if the settlor directed personal property to be changed into real property, the resulting trust would be a trust of realty in favor of the heirs of the settlor.

[58] Woolmer's Estate, 3 Whart. 477 (Pa.).

33. **Same subject—Class III: Payment of purchase price by one, title taken in the name of another.** —At common law, and in the great majority of American states to-day, if A pay the purchase price of land and, by his direction, X, the seller of the land, convey it to B, a trust is presumed to result in favor of A. And the same rule applies to transfers of personal property.[59]

The reason is the same which is the basis of resulting trusts of classes I and II, namely, that the presumption is that a man does not give away his property. When A pays for the land above-mentioned, the law presumes that he intends to get something for his money. He does not get the legal title, for that goes to B, hence the courts of equity give A the equitable title. By virtue of that presumption A will get his money's worth. Otherwise he would be making a gift to B.

The trust results to A, in the illustration given, whether the consideration paid by A be money or other property. If A pays only part of the consideration and B or someone else pays the rest, a trust results in A's favor only when A has paid his part with an understanding that he is to have a definite part of the property bought, as, for example, half the purchase price, with an understanding that he is to have half the land. It is not sufficient that A has paid a part of the price with the understanding that he is to have an indefinite interest in the land. So, too, it must be A's money which makes up the purchase price. And, referring again to the example above, if

[59] Ward v. Ward, 59 Conn. 188; 1 Perry, Trusts (6th ed.), § 130.

A lend the money to B and then B pay the purchase price, no trust results to A, because it is B's money that brings about the conveyance. But if B lend the money to A, and the money is paid over to X by B directly, there is a trust resulting in favor of A, because, although B paid the money, it had, by the loan from B to A, become A's money.[60]

If A, B and C pay the consideration and property is bought in the name of X, a trust results to A, B and C jointly. If A, B and C buy the property, but take title in the name of C, he will become a resulting trustee as to two-thirds in favor of A and B.[61]

The resulting trust arises, if at all, at the time the property is conveyed. Thus, if B purchase land in his own name with his own money and later A pay to B money as the consideration for this purchase, no trust will result to A. At the time of B's purchase his holding was one for his own benefit. It cannot become a holding for A's benefit by a subsequent act of A with reference to the purchase price. A must pay the purchase price when B gets the title in order to get the benefit of a resulting trust.[62]

The payment of the purchase price by A when B takes the title raises merely a presumption of a trust. The trust is established unless there is sufficient evidence on the side of B that B was to hold for his own benefit; that is, that the transaction was practically a gift from A to B. When A is the husband or father of B this natural presumption is often overcome. The

[60] Scott v. Beach, 172 Ill. 273.

[61] Baumgartner v. Guessfeld, 38 Mo. 36.

[62] C. E. Grinell, Subsequent Payments under Resulting Trusts, 1 Harvard Law Review 185; Niver v. Crane, 98 N. Y. 40.

courts consider it reasonable to suppose that in such a case A is making a gift or advancement to B, for he owes B the duty of support and bears toward him or her natural affection. Hence, in the last named case, that of payment of the purchase price when the conveyance is to the payor's wife or child, a gift is presumed and presumptively no trust results. This presumption may, of course, be overcome and the wife or child may be shown to be a resulting trustee.[63]

Logically, class III ought to be treated as class I has been treated and all presumptions of a trust abolished, so that trusts would exist in such cases only when proven by evidence other than the mere payment of the consideration to have been intended. There is logically no more reason why a man should be presumed to intend a trust in his own favor when he pays the purchase price of land and secures a conveyance of it to another than when he conveys it directly to that other without consideration.

34. **Same subject—Class III: Statutory modifications.**—In New York, Michigan, Wisconsin, Minnesota and Kentucky resulting trusts of this class have been abolished by statute.[64] It should be noticed that these statutes apply only to real property and that they generally except cases in which the purchase

[63] Lufkin v. Jakeman, 188 Mass. 528, LEADING ILLUSTRATIVE CASES.

[64] New York Real Property Law, § 94; Hamilton v. Wickson, 131 Mich. 71; Skinner v. James, 69 Wis. 605; Stitt v. Rat Portage L. Co., 96 Minn. 27; Watt v. Watt, 39 S. W. 48 (Ky.). The New York Statute is typical and reads as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the pay-

in the name of another than the payor was made without his knowledge or consent. In the last named cases there would be actual fraud on the payor and hence a constructive trust implied by law. The rights of creditors are also excepted, so that the payment of the consideration money is presumed to be fraudulent as to them and a constructive trust is created in their favor. But the payor, himself, if he voluntarily pays money and allows the title to property he has paid for to be conveyed to another, has no rights in the property, under these statutes.

The construction given to these statutes has, however, been such as largely to draw their teeth. Thus, it has been held that if A pay the consideration for a conveyance to B upon the understanding that the conveyance is for the benefit of C, the statute does not apply and a trust exists in C's favor.[65] And, partnership realty being considered personalty, it has been held that, when a partnership pays the purchase price of realty, title to which is taken in the name of X, a trust results in favor of the partnership.[66] And so, if there is any fraud connected with

ment to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

The object of the framers of this statute seems to have been to complete the abolition of passive trusts (those in which the trustee has no duties) and so to make the searching of titles easier and safer and to prevent fraud. Notes of the revisers, Fowler, Real Property Law of New York (3d ed.), p. 1295.

[65] Siemon v. Schurck, 29 N. Y. 598.

[66] Fairchild v. Fairchild, 64 N. Y. 471.

the transaction, the courts of equity will be quick to seize upon that and imply from it a constructive trust, even though the payment of the consideration is an essential part of the fraud.[67] And if the grantee convert the real property into personal property, the latter may be reached by a resulting trust, since the statute has application only to purchases of real estate.[68]

In Indiana and Kansas the statutes apparently have a less drastic effect. They merely remove all presumption of a resulting trust when A pays the purchase price and title is taken in the name of B. A must prove the trust. The law does not imply it for him.[69]

35. **Same subject—Class IV: Payment of purchase price with fiduciary funds.**—If a trustee, with the consent of the beneficiary, purchase property with trust funds and take the title in his own name, but not as trustee, a trust will result in the property so purchased in favor of the beneficiary. And the same principle applies to agents, guardians, executors and other persons occupying fiduciary relations who are not strictly trustees. If the purchase is made without the consent of the beneficiary, a trust is created, but it is not a resulting trust, but rather a constructive trust.[70]

The resulting trust of this class is based on the idea that the beneficiary has paid the purchase price

[67] Jeremiah v. Pitcher, 26 N. Y. App. Div. 402; affirmed, 163 N. Y. 574.
[68] Robbins v. Robbins, 89 N. Y. 251.
[69] Glidewell v. Spaugh, 26 Ind. 319; Hanrion v. Hanrion, 73 Kans. 25.
[70] Whaley v. Whaley, 71 Ala. 159; Barger v. Barger, 30 Ore. 268, 274; Hanson v. Hanson, 78 Neb. 584, 592.

and, therefore, ought to have the benefit of the thing purchased. Thus it appears that this class of resulting trusts is merely a subdivision of class III. In both classes III and IV the person in whose favor a trust results has paid money for property which has been conveyed to another. In class III the payor was the legal owner of the consideration paid. In class IV the payor is the equitable or beneficial owner of it. In both cases it is a proper presumption that the payor intended the purchase to be for his benefit, and not for the benefit of the taker of the legal title. Out of that presumption in both cases the trust arises.

By far the larger number of cases involving purchase of property with trust funds are cases where the trustee uses trust funds to buy property for himself wrongfully and without the knowledge of the beneficiary. In such cases the beneficiary has his option of electing to consider the property bought the subject of a constructive trust in his favor or of holding the trustee personally liable for the amount of the trust fund misappropriated, with a lien on the property bought. This subject will be further considered in the sections on constructive trusts and on the remedies of the beneficiary.[71]

36. **General theory underlying constructive trusts.** —Of the two classes of implied trusts, resulting trusts have been considered in the preceding sections. It has been seen that courts of equity create them because of a presumption that the parties must have intended that they should arise. It remains to con-

[71] See §§ 37, 39-40, 84.

sider constructive trusts. These trusts are sometimes called involuntary trusts or trusts *ex maleficio*. They arise because the courts of equity consider them necessary to work out justice between the parties. They arise irrespective of the intent of the parties and generally quite contrary to their intent. Whenever a court of equity finds A holding the legal title to property which in all fairness and justice belongs to B, it will adjudge A to be a constructive trustee of it in B's favor.[72] Equity might in many cases equally well decree immediately that A convey the property to B, but that is not the theory adopted. The constructive trust will result in a conveyance by A to B, but such a trust is the first step to that conveyance. These trusts arise in a great variety of ways. Equity is not restricted by any well-defined rules in their creation, but will construct a trust of this kind whenever necessary to accomplish justice. These trusts are not true trusts, but are merely instruments of equity to accomplish the ends of justice. They are purely passive; that is, the trustee has no duty except to deliver the property to the beneficiary. The only difficult problem with respect to them is the problem of their origin. In what cases will equity create a constructive trust? This is a question of equity jurisdiction rather than of the law of trusts, and hence no attempt will be made here to do more than to give illustration of the more important instances in which these trusts arise. It should again be noted that to this class of trusts, as to all implied trusts, the Statute of Frauds has no

[72] Hendrix v. Nunn, 46 Tex. 141; 1 Perry, Trusts (6th ed.), p. 261.

application. Written evidence is not necessary to their origin.

37. **Actual fraud or other wrongdoing.**—The simplest instances of constructive trusts are those of trusts arising from actual wrongdoing. "Wherever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, by deed or by will, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and order him to account upon equitable principles, and to make a reconveyance of the property."[73] Thus, if A, through misrepresentation or the suppression of a fact which it was his duty to state, procure from B a conveyance of B's property, and B has no adequate remedy at law, equity will construct a trust for B's relief and, after creating the trust, the court will decree the conveyance of the property from A, the trustee, to B, the beneficiary.[74] The fraud here necessary has the same essentials as that which forms the foundation of the action of deceit. Or if A make a will leaving property to B upon the promise that B will deliver a part of the property to C after A's death, a court of equity will declare B a constructive trustee of the property received by the will so far as is necessary to protect C, if B refuses to deliver the proper portion of the prop-

[73] 1 Perry, Trusts (6th ed.), p. 268.

[74] Bacon v. Bronson, 7 Johns. Ch. 194 (N. Y.).

erty to C.[75] Or if A steal property from B, and transfer it to C, who has knowledge of the theft, equity will declare that C holds the property as a constructive trustee for B because of the actual wrongdoing.[76] The element common to this class of constructive trusts is that one person has obtained through an actual wrongful act the legal title to property equitably belonging to another. Justice demands that the wrongdoer hold as a constructive trustee.

The actual fraud may exist, not on the part of the person receiving the legal title, but on the part of the person conveying it. The fraud will in such cases be against third parties, not against the person parting with the legal title. The most frequent illustrations of this variety of constructive trusts are seen in cases of fraud on creditors and fraud on marital rights. If A, while a debtor of B, transfer his property to C with the intent to defraud his creditors, and C knows of A's intent or pays nothing for the property, C will be decreed to be a constructive trustee for B, the creditor.[77] This is on the theory of an actual fraud attempted upon the third party, B. And so, if A and B are engaged to be married, and A, with the intent of defrauding his intended wife, B, of her dower rights, conveys his real property to C, who pays no consideration or has notice of A's intent, a court of equity will declare that C hold the property under a constructve trust for B for the purpose

[75] Dowd v. Tucker, 41 Conn. 197, LEADING ILLUSTRATIVE CASES.
[76] Newton v. Porter, 69 N. Y. 133.
[77] Metcalf v. Moses, 161 N. Y. 587.

of protecting her dower rights.[78] This, too, is a trust growing out of the desire of equity to prevent fraud.

It is under this head that trusts arising from the misappropriation of trust funds should be placed. The resulting trust arising from the investment of trust funds in the name of the trustee individually with the consent of the beneficiary has been previously noticed. There is no fraud in such a transaction. But if the investment is without the beneficiary's consent, there is fraud and that fraud will enable the beneficiary to fasten a constructive trust upon the property bought, so long as it is in the trustee's hands or the hands of anyone except a purchaser for value without notice of the trust.

38. **Violation of voidable oral promise as fraud.** —It is not, as a general rule, such fraud as to give rise to a constructive trust, that one who has made an oral promise, voidable under the Statute of Frauds, refuses to perform it. Thus, if A convey land to B without consideration and upon the oral promise of B that he will hold it in trust for A, and B repudiate the oral promise and refuse to hold in trust, equity will not, according to the weight of authority in this country, declare B a constructive trustee. B's promise is unenforcible under the section of the Statute of Frauds which declares that trusts in lands must be proved by writing. The view of these courts is that to refuse to do what the law will not compel a man to do is not fraudulent.[79] The

[78] Youngs v. Carter, 10 Hun 194 (N. Y.).

[79] For a collection of the authorities, see 15 Am. & Eng. Ency. of Law, (2d ed.), pp. 1192, 1193; 6 Columbia Law Review 326.

American courts in a few states, such as Indiana, and the English courts, create a constructive trust in this situation. And generally such a trust will be constructed by equity if B did not intend to perform his oral promise when he obtained the conveyance, or was guilty of any other fraud at that time; or if the expression of the trust was omitted from the written deed by mistake; or if B occupied a confidential relation toward A, such as that of guardian or attorney. But the mere violation of the oral agreement, without any attendant circumstances, is not such fraud as to cause equity to interfere by the creation of a constructive trust.[80]

Another provision of the English Statute of Frauds quite generally adopted in this country is that no interest in lands, except short leasehold interests, can be created without writing. The question often arises whether the breach of an oral promise, the performance of which would result in the creation of an interest in lands, will be viewed by equity as such fraud as to give rise to a constructive trust. The answer generally given is in the negative. Thus, if A agree orally with B that B shall act as A's agent and buy land for A with A's money, and B, instead, purchase the land for himself with his own money, equity will not as a general rule declare B a constructive trustee of the land for A. And if A agree orally with B that B shall purchase land in B's name with B's money and later convey it to A or give A an interest therein, and, instead, B buys the land and holds it entirely for himself, as a general rule

[80] Patton v. Beecher, 62 Ala. 579; Lawson v. Lawson, 117 Ill. 98.

equity will not declare B a constructive trustee for A. But if A, prior to the agreement with B, have an interest in the land in question, and fail to protect it, relying on B's oral promise to buy the land and hold it according to the terms of the promise, then equity will interfere and protect A by a constructive trust. But the breach of the oral promise, voidable under the Statute of Frauds, without more, is not fraud of the kind sufficient to cause the creation of a constructive trust.[81]

39. **Fraud presumed—(a) Fiduciary transactions with respect to trust property.**—It is not only in cases where there is actual fraud that the constructive trust arises. In many instances fraud is so apt to exist that equity presumes it exists. Certain transactions are so open to fraud and unfair dealing that equity discourages them, even though in individual cases no injustice might occur. The most common of these transactions are those in which a fiduciary is concerned. The word "fiduciary," as here used, includes not only a trustee of the technical kind, but quasi-trustees, such as agents, guardians, executors, partners, attorneys and others. It is a cardinal rule of equity that such a person will not be allowed to do any act with respect to the property in his charge in which his individual interest may conflict with his interest as a representative. Thus, if A, a trustee for B, directly or indirectly buy the trust property for his own benefit at a sale of it, even though he give a fair price for it, he may be, at the election of B, declared a constructive trustee

[81] Burden v. Sheridan, 36 Iowa 125; Watson v. Erb, 33 Oh. St. 35.

of the property in favor of B. The beneficiary, B, may allow the sale to stand or avoid it, at his option. And the same rule applies to a purchase by a fiduciary of a claim against the trust property owned by a third person and to the making of any profit from the trust relation. The fiduciary must act for the beneficiary alone. If he acts for himself, his acts may be set aside, at the wish of the beneficiary, through the use of a constructive trust. This is because of a conclusive presumption of fraud which equity creates. It is of no use that the fiduciary show that his acts have been fair and the price paid reasonable. If the beneficiary choose, the property in the hands of the fiduciary may be made subject to a constructive trust.[82]

40. **Same subject—(b) Contracts between persons upon an unequal footing.**—Contracts and conveyances between trustee and beneficiary, guardian and ward, executor and legatee, attorney and client, persons closely related and normal and weak-minded persons are subject to close scrutiny by courts of equity. There is a presumption that the stronger and more influential of the two will get an advantage over the weaker. Therefore, it is held that, if a beneficiary of a trust convey property to his trustee, the transaction is presumptively fraudulent and, unless the trustee can show that he has used the utmost good faith, the beneficiary will be allowed to compel the trustee to hold as constructive trustee for him. The presumption of fraud in this case is not con-

[82] King v. Remington, 36 Minn. 15; Church v. Winton, 196 Pa. St. 107, LEADING ILLUSTRATIVE CASES; Case v. Carroll, 35 N. Y. 385.

clusive, as is that with respect to dealings with the trust property by the fiduciary. The presumption here is rebuttable, and if the trustee, guardian, attorney or other fiduciary can prove that he paid full value for the property he has acquired and that the beneficiary, ward or client acted in complete freedom and was not defrauded, the fiduciary may hold the property. In certain cases, namely, those of contracts between trustee and beneficiary, guardian and ward, and attorney and client, the relationship alone is sufficient to throw the burden on the fiduciary of proving fairness. In other instances, as when the parties are husband and wife or normal person and weak-minded person, no such burden of proof is cast on the stronger, unless there are additional circumstances pointing toward fraud.[83]

[83] McParland v. Larkin, 155 Ill. 84; Allore v. Jewell, 94 U. S. 506.

CHAPTER V.

THE TRUST PURPOSE—PRIVATE TRUSTS.

41. **Trusts classified with respect to purpose.**—Having seen what acts are necessary to the creation of trusts, it is next necessary to discuss the purposes for which trusts may be and are created. From the point of view of purpose trusts are first classified as private and public. Public trusts are also called charitable trusts. A private trust is a trust created for the benefit of a definite individual or individuals. Thus, a gift by a father to a trustee to hold in trust for his son is a private trust, the son being a definite, ascertained person. A public or charitable trust is one in which the beneficiaries are indefinite individuals who are to be selected from the whole public or from a certain large class of the public by the trustees. Thus, a gift to A in trust to supply clothing to the needy children of the village of X is a charitable trust, since those children are not definite, ascertained persons, but their identity depends upon the judgment of the trustees. The various kinds of private trusts will first be discussed and then charitable trusts will be examined. Trusts are also classified as to purpose as active and passive trusts. Active trusts are also known as special trusts, and passive trusts are frequently called general, dry or naked trusts. An active trust is one in which the trustee has duties to perform. Thus, the ordinary trust to

hold real estate and collect and distribute the rents and profits is active. A passive trust, on the other hand, is a trust in which the trustee is not charged with any duties, but merely acts as a holder or receptacle of the legal title. Thus, if A convey property to B "in trust for C," without any mention of B's duties respecting the land, B will be a passive trustee. Express trusts may be either active or passive. Implied trusts are practically always passive. Since the essential feature of passive trusts is that they have no purpose, except the holding of the legal title by the trustee, no extended discussion of them under this heading will be necessary. It will be sufficient to note the effect of certain legislation upon them. The remainder of the discussion with regard to the possible purposes of trusts will be confined to active trusts.

42. **Effect of legislation on passive trusts.**—Prior to the Statute of Uses (1535) it was very common in England to convey land to A "to the use of B." A was a receptacle of the legal title and had no active duties. B took the profits and had the enjoyment of the land. This relation was called a use and was the predecessor of the modern passive trust. The Statute of Uses, as shown by previous discussion,[84] provided, in substance, that, upon the creation of a use, the legal title should vest in the beneficial owner of the property, and, hence, after its passage, the statute executed the use, as the phrase ran. So, in the illustration above, the legal title was carried through to B by the execution of the use. The use

[84] See §§ 6, 7.

was destroyed. A passive trust could not exist under the statute, because the statute took the legal title from the trustee and gave it to the beneficiary. The courts excepted certain uses from the operation of the statute by judicial construction, but it is not necessary to consider those exceptions here. The point to be noted is that, wherever the Statute of Uses is in force, trusts passive at the time of their creation have been rendered impossible. A trust, in other words, must have a purpose; the trustee must have duties other than the mere holding of the title. The Statute of Uses, or the principle involved in it, is in force in practically all American states. Of course, the Statute of Uses and its successors have application only to real property. Hence, a passive trust of personal property is still possible. But passive trusts of real property are rare in America.[85] In states such as New York, Wisconsin and Michigan there are express statutory provisions abolishing passive trusts in land and providing, in substance, that "Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest."[86]

43. **Trust purposes valid at common law.**—At common law a trust might be created in real or personal property for any purpose, as long as there was

[85] 3 Pomeroy, Equity Jurisprudence (3d ed.), § 986, note.
[86] New York Real Property Law, § 92.

no violation of a statute or contravention of public policy. The number of trust purposes was limited practically only by the imagination of the settlor. Of course he could not create a trust to assist in treason or to aid unlawful or immoral acts, but otherwise he was unrestricted. And such is the condition in most American states to-day. The answer to the question, for what purposes may a trust be created? is, in all American jurisdictions, if the subject-matter be personalty, that it may be created for any legal purpose; and if the subject-matter be realty, the answer is the same in most American states.

44. **Statutory restrictions of the purposes of real property trusts.**—In a few states, notably New York, Wisconsin, Michigan, Minnesota, California and South Dakota, the legislatures have arbitrarily limited the purposes for which trusts in real property may be created. All trusts in real property except those expressly authorized are abolished.[87] The New York statute is the model from which the others have been drawn, and reads as follows "An express trust may be created for one or more of the following purposes: 1. To sell real property for the benefit of creditors; 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life

[87] See 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1003 and note for a collection of the authorities. See also Compiled Laws of Michigan, 1897, § 8839; Sanborn & Berryman's Statutes of Wisconsin, 1898, § 2081; Kelly's Minnesota Statutes, 1891, § 4013; California Civil Code, § 857.

of that person, or for any shorter term, subject to the provisions of law relating thereto; 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."[88] These statutes have made the law of trusts in the states named very peculiar, since the question constantly arises there, which is elsewhere unheard of, namely, is the purpose of the trust an authorized purpose?

45. **Effect of attempt to create unauthorized trust.**—In a majority of the states named as having statutory restrictions upon the purposes for which express trusts in real property may lawfully be created, an attempt to create a trust not authorized is not a nullity and of no effect. The attempted trust cannot be permitted to take effect as a trust because of the prohibition of the statute, but by the same statute it may take effect as a power in trust.

The provision in the state of New York is typical of the provisions generally prevailing in states having the statutory systems of trusts. It reads as follows: "Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or

[88] New York Real Property Law, § 96.

descend to the persons otherwise entitled, subject to the execution of the trust as a power.[89] A power may be roughly defined as an authority to do an act in relation to property which an owner of it might do. A power in trust is a power to do an act for the benefit of others than the holder of the power. The effect of an attempt to create an unauthorized trust in these states may be illustrated as follows: If A devise real property to B in trust to divide the land between X, Y and Z, the trust cannot take effect because no trust to partition lands is authorized by the statute. But the will does not entirely fail. The property devised to B descends to the heirs of A, upon his death, and B becomes the holder of a power over the lands to partition them between X, Y and Z. The legal title to the lands is in the heirs of A, not in B, as it would have been if a valid trust had been created, but the heirs hold the lands subject to a power in B to divide the lands and transfer the proper shares to X, Y and Z. The same result is accomplished by the power in trust in the hands of B as would have been accomplished by a trust to partition. It is simply a distinction in the method. For the purpose of simplifying the records of titles to land by a reduction in the number of trusts, these legislatures compel a resort to powers rather than trusts, except in cases where it is either necessary or highly convenient for the actor to have the legal title.[90]

[89] New York Real Property Law, § 99.

[90] Compiled Laws of Michigan, 1897, § 8842; Sanborn & Berryman's Statutes of Wisconsin, 1898, § 2084; Cooke v. Platt, 98 N. Y. 35, 38.

46. **Restrictions on the purposes of trusts through the rule against perpetuities.**—The purposes for which trusts may be created are somewhat restricted by a rule of the law of property known as the rule against perpetuities. The English rule of this name, and the prevailing rule in this country, is that future interests in property must vest within a certain limited period, namely, during the existence of lives in being and twenty-one years thereafter.[91] No interest in property may be created in any way which will be contingent for a period longer than one measured by the duration of some life or lives in being at the time the interest is created and twenty-one years after the cessation of such life or lives. The object of the rule is to prevent property from becoming unduly burdened with possible and contingent interests and to promote its marketability as an object of commerce at a fair price. As applied to trusts and the purposes for which they may be created, this rule results in the following restriction: The purpose of the trust must be such that the trust will arise within the statutory period; that is, lives in being and twenty-one years. For example, a gift to trustees to hold upon certain trusts, to begin when a certain gravel pit is worked out, is void as violating the rule against perpetuities, because the gravel pit may not be worked out within lives in being and twenty-one years, and hence the equitable estate of the beneficiary may not vest until too remote a period.[92]

[91] See Gray, Perpetuities (2d ed.), §§ 728-752, for a statement of the statutory changes in the United States.

[92] In re Wood, (1894) 2 Ch. 310 (Eng.); Gray, Perpetuities, § 413.

A trust does not violate the rule against perpetuities in this sense, in case it may last indefinitely. In such circumstances there is no suspension of the vesting of any interest, legal or equitable. A trust may, in a certain indirect sense, violate this rule, however, if it last longer than lives in being and twenty-one years, and then a contingent remainder is limited after it. For example, if A give property to B to hold in trust for 200 years, and at the end of that time the property is to go to the eldest male descendants of B then in being, in fee simple, the gift to the descendants would be void, because it could not vest within lives in being and twenty-one years. Not until 200 years would it be known who the remaindermen were. But the trust to B would not itself be void. The interests under it would all be vested. Yet because it would last longer than lives in being and twenty-one years it vitiates the remainder following it.

In a number of American states an entirely different view of the meaning of the rule against perpetuities has been taken. The statutes of New York, Wisconsin, Michigan, California and a number of other states treat this rule as one against suspending the power of alienation for an undue length of time. Such states consider the rule violated when, for too long a period, there is no one in being who can convey the complete title to the property in question. This interpretation of the rule, coupled with the provisions of the statutes in a number of these same states that the interest of the beneficiary of a trust to collect the rents and profits of property and de-

liver them to a beneficiary is inalienable, has an important effect on the law of trusts in such states. Under the last named provisions, a trust to collect and pay over the rents and profits suspends the power of alienation. Under the statutes of the same states previously referred to, the power of alienation may not be suspended longer than a given time, in some instances as short a time as two lives in being. The result is that trusts of this kind, that is, to collect and deliver rents and profits, are restricted in their duration to the period of the rule against perpetuities. Thus, in New York, if land be devised to A in trust to collect the rents and profits and deliver them to X, Y and Z, or the survivor or survivors of them, until the longest liver of them die, the trust will be void as violating the rule against perpetuities, because the interests of X, Y and Z are inalienable and hence the power of alienating the property which is the subject-matter of the trust is suspended for three lives, whereas the rule against perpetuities allows such power to be suspended only during two lives in being.[93] These two rules, in the states following the New York statutory system of trusts, restrict seriously the purposes for which trusts may be created.[94]

47. **Restrictions on the purposes of trusts through the rule against accumulations.**—A second rule which the framers of trusts must bear in mind as restricting their liberty is called the rule against accumulations.

[93] Central Trust Co. v. Egleston, 185 N. Y. 23.

[94] For examples of the form of these two varieties of statutes, see New York Real Property Law, §§ 42, 103, and Woodgate v. Fleet, 64 N. Y. 566.

It is to the effect that the income of property shall not be accumulated and the ownership of such accumulation suspended for too long a period. This rule is a corollary of the rule against perpetuities. It is aimed against the hoarding of the income of property without the existence of a right of enjoyment in any living person. Just how long this accumulation may take place and the vesting of the ownership of the accumulated sum may be suspended is variously decided in the several jurisdictions. In England four lawful periods of accumulation are now fixed, namely, during the life of the giver, during twenty-one years after the giver's death, during the minorities of any persons living at the giver's death, or during the minorities of persons who would be entitled to the income of the fund. Any one of these periods may be used.[95] This statute seems to have been followed closely in Pennsylvania.[96] In the majority of American states the period of lawful accumulation is the same as that in the rule against perpetuities; that is, generally, lives in being and twenty-one years.[97] In New York and the states following its system of trusts the accumulation may be only during a minority and for the benefit of a minor.[98]

Accumulations are practically always made through trusts. Hence, this rule against unlawful accumulations has an intimate bearing on the sub-

[95] The Thellusson Act, 39 & 40 Geo. III, chap. 98.

[96] Act of April 18, 1853, § 9.

[97] 1 Reeves, Real Property, § 972.

[98] New York Real Property Law, § 61; New York Personal Property Law, § 16.

ject of the lawfulness of the purpose of trusts. If A devise property to B to hold in trust for 500 years, collect the rents and profits, accumulate them, and at the end of the 500 years pay them over to the persons who would then be the heirs of A, the trust is invalid. It has for its purpose an accumulation beyond the period during which accumulations are anywhere allowed. The gift to B will have no effect and the property will go to those persons who would have taken it had the direction to accumulate and the gift of the accumulated fund both been omitted from the will. The heirs or next of kin of A will take it, in the absence of a residuary clause in the will.[99]

48. **The more common purposes of express private trusts.**—Having considered the purposes for which private express trusts may be created, it remains to enumerate the purposes for which they are commonly used, and then to discuss briefly two kinds of express private trusts which present some peculiarities. Among the more common trusts, in those states not having the statutory restrictions on purpose, are trusts "to sell, and from the proceeds to pay creditors of the settler; to sell, mortgage, or lease to pay legacies or charges; to manage, receive the net income and pay it over to designated persons or apply it to their maintenance and support; to receive the net income and accumulate it for a specified object; to sell and pay the proceeds to the settler; to receive the income and raise therefrom a jointure or marriage portion; to convey to specified persons; to par-

[99] Gray, Perpetuities (2d ed.) § 671.

tition; to mortgage or lease, and out of the proceeds to pay the settler's debts; to hold for the sole and separate use of a married woman."[1] With the exception of trusts for married women and the so-called spendthrift trusts, these trusts possess the ordinary incidents of the trust relationship and their administration and effect will be considered generally in the succeeding sections.

49. **Trusts for married women.**—At common law a husband was entitled to the absolute ownership of his wife's personal property of which he had possession and to the use of her realty during his life. It was very difficult, except through the generosity of her husband, for a married woman to obtain the use or benefit of any property during the marriage. For the purpose of protecting married women and allowing their relatives to make settlements upon them, the English court of chancery recognized trusts for the separate use of married women. Under these provisions a married woman might obtain the income of property held by a trustee, and her husband could not reach it. It was not even necessary that a trustee be mentioned in the instrument making provision for the wife. If the property was given to the married woman for her sole and separate use, the husband would be considered a trustee of it for her. It was soon held, however, that the interest of a married woman under such a trust was alienable, and the value of the trust was lessened, because the husband could easily influence the wife to alienate as he desired. But later a provision was invented and incor-

[1] Reeves, Real Property, p. 468.

porated into these trusts forbidding the anticipation of the income by the wife. Courts of equity gave effect to this clause and held it to prevent alienation by the wife. These trusts were in common use until the modern legislation giving married women property rights equal to those of single women. Since such acts have been passed, there has been little need for them to accomplish their original purpose. Quite generally throughout the United States married women may take, hold, take profit from and dispose of property without the consent or interference of their husbands. For the situation in any given state on this subject reference must be made to works on husband and wife or domestic relations.[2]

50. **Spendthrift trusts.**—A spendthrift trust is one in which the income of the property given in trust is not alienable by the beneficiary or through the efforts of the beneficiary's creditors. Thus, if A convey property to B to hold in trust for X, a son of A, and pay the income to X, during his life, and a provision be made that X may not alienate his interest under the trust, and that it is not to be subject to the claims of X's creditors, the trust is a spendthrift trust. The beneficiary has only the right to the income when paid to him. He may not anticipate the payments by a sale or mortgage of his rights, nor may his creditors levy upon the interest of the beneficiary before the payments are made to him. They must resort solely to the money in the beneficiary's hands. There are three classes of cases upon the subject of the legal possibility and the incidents of

[2] 1 Tiffany, The Modern Law of Real Property, §§ 176-178.

such trusts. First, the English view, which is that such trusts are impossible, since they attempt to give a man property without attaching to it the inevitable incidents of property, namely, alienability or saleability and liability for debts.[3] Secondly, the general American view, that such a trust is possible, and that a provision against alienability or liability for debts is not against public policy or detrimental to the rights of creditors. A man should be allowed to give to another all or a part of the rights attaching to any article of property. Creditors should inquire as to the sources of the income of their debtors and should not give credit to persons so restricted.[4] Thirdly, the rule in several states, such as New York, is affected by statutes which, without any expression in favor of inalienability on the part of the settlor, render inalienable the income of trusts to collect the income of property and deliver it to a beneficiary.[5] In some states, also, as in New York, the further statutory provision appears that creditors may reach the surplus of the income above what is reasonably necessary for the "education and support" of the beneficiary. But it has been uniformly held that

[3] Apparently followed in R. I., N. C., S. C., Ga., Ala., Oh., Ky. and Ark.; see Gray, Restraints on Alienation (2d ed.), § 178; 26 Amer. & Eng. Encyc. of Law (2d ed.), p. 138.

[4] Broadway Nat. Bank v. Adams, 133 Mass. 170, LEADING ILLUSTRATIVE CASES; see note, Ames, Cases on Trusts (2d ed.), p. 400; apparently this rule is approved in Pa., Mass., Ill., Me., Md., Miss., Vt., Mo., Tenn., Del., Ind., and Va.; Gray, Restraints on Alienation (2d ed.), § 178.

[5] New York Real Property Law, §§ 98, 103; Williams v. Thorn, 70 N. Y. 270; the following states seem to have followed New York to some extent at least in its legislation on spendthrift trusts: Ill., N. J., Tenn., Calif., Ind., Kans., Mich., Minn., N. D., S. D., Wis., Okla. See Gray, Restraints on Alienation (2d ed.), § 296; 26 Amer. & Eng. Encyc. of Law (2d ed.), note, pp. 149, 150; 2 Perry, Trusts (6th ed.), § 827a.

one may not create a spendthrift trust for his own benefit and thus set aside a portion of his property which shall not be liable to the claims of his creditors.[6]

[6] Schenck v. Barnes, 156 N. Y. 316.

CHAPTER VI.

THE TRUST PURPOSE—PUBLIC TRUSTS.

51. **Definition of charitable trust.**—The previous sections with respect to the possible and common purposes of trusts have dealt with such only as were private trusts. It remains to consider from the point of view of purpose the public or charitable trust. "A charity, in the legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."[7] The essential idea of a charitable trust is that the benefit of the trust is to be for the whole public or some large class of the public as distinguished from private persons. The beneficiaries are not named, ascertained individuals, but indefinite, unknown persons whose identity will only become known by the selection of them from the class to which they belong. This selection will be made by the trustees. This idea that the beneficiaries must be indefinite distinguishes the charitable trust sharply from the private trust. In

[7] Jackson v. Phillips, 14 Allen 539, 556 (Mass.).

that trust the beneficiaries must be certain and ascertained, otherwise the trust will fail for want of someone to enforce it. But with charitable trusts this indefiniteness is allowed. The state itself will enforce the trust for the indefinite beneficiaries. As will be seen from the succeeding discussion, charitable trusts are treated with much greater leniency by the courts of equity than are private trusts.

52. **History of charitable trusts.**—The English courts of chancery before the seventeenth century had in a number of cases taken jurisdiction of trusts for charity and had sustained them. If A gave property to B in trust for the maintenance of a free school in the village of X, chancery supported the gift from reasons of public policy and compelled B to execute the trust, even though the beneficiaries were indefinite persons. In 1601 the English parliament passed, as the culmination of a series of statutes on the subject, the famous Statute of Charitable Uses.[8] This statute enumerated in its preamble the charitable trusts in common use then and provided in its body means for the protection and enforcement of them. The preamble of this statute is often resorted to by modern courts to determine what purposes are at present valid charitable purposes.[9] It

[8] 43 Eliz., chap. 4.

[9] The purposes mentioned in the preamble as charitable were as follows: Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in university; houses of correction; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes. 2 Perry, Trusts (6th ed.), p. 1136.

is now the accepted doctrine of the American courts that charitable trusts do not depend on this statute for their existence but have ample ground for support in the general equity powers of the court of chancery. Hence it is not highly important whether this statute has been adopted as a part of the law of any given American commonwealth. It seems to have been rejected and accepted in about an equal number of states.[10]

Irrespective of the Statute of Charitable Uses, charitable trusts are generally recognized in the United States as distinct from private trusts and not subject to the same restrictions with respect to definiteness of beneficiaries and the rules against perpetuities. But a few states, such apparently as Michigan, Minnesota and Maryland, deny charitable trusts any existence except upon the same terms as apply to private trusts.[11]

53. **What purposes are charitable?**—Charitable purposes may be roughly divided into four principal groups, as follows: (1) Religious purposes. It is universally conceded that trusts to aid directly or indirectly in the establishment or maintenance of religion are charitable trusts.[12] Thus, a trust to build or keep in repair a church structure, or to distribute

[10] The statute seems to have been considered a part of the common law, reënacted or recognized in Ill., Ky., Me., Mass., Mo., N. C., N. Y., Conn., R. I., Ga., Oh., and Pa. In Calif., Del., D. C., Ind., Md., Mich., Miss., N. J., S. C., Tenn., Va., and W. Va., the existence of the statute as a part of the American law has been denied. In Ala., N. H., Tex. and a number of other states the question seems undecided. See 5 Am. & Eng. Encyc. of Law (2d ed.), pp. 899, 900; 6 Cyc. pp. 901, 902.

[11] For a collection of the American Statutes and authorities, see 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1029 and notes thereto.

[12] McAlister v. Burgess, 161 Mass. 269, LEADING ILLUSTRATIVE CASES.

bibles or other religious literature, or to assist in the support of needy clergymen or theological students, or to aid in the conduct of missions is a valid charitable trust. A trust for the purpose of having masses said for the repose of souls is generally held to be a valid charitable trust for a religious purpose.[13] (2) Educational purposes. The spread of knowledge and culture is a valid charitable purpose.[14] Therefore, trusts to aid colleges or universities, or to found and maintain libraries, or distribute literature, or to endow scholarships or professorships are valid charitable trusts. (3) Eleemosynary purposes. The relief of poverty, sickness or other distress is a valid charitable purpose.[15] Hence a trust to found or maintain an asylum, hospital or home for the feeble-minded, sick, aged, needy or friendless, or to provide privately for the relief of the poor or distressed is valid as a charitable trust. (4) Governmental purposes. The object of assisting the government in carrying out its purposes is a valid charitable object. Thus, trusts to beautify and care for parks and streets, to erect monuments for distinguished men, to construct buildings for governmental purposes or to aid in caring for the poor who are government charges, come within this class.[16] The erection of a monument or tomb is generally considered a part of the funeral expenses of a deceased person and hence properly provided for by will on that ground.

[13] Hoeffer v. Clogan, 171 Ill. 462; contra, Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327.

[14] Jackson v. Phillips, 14 Allen 539 (Mass.).

[15] Trim's Estate, 168 Pa. St. 395.

[16] Smith's Estate, 181 Pa. St. 109.

But a trust to erect and maintain a monument or care for a cemetery lot is not considered, aside from statutory authorization, a valid charitable trust.[17]

54. **Attitude of equity toward charitable trusts with impossible, imperfect or illegal purposes.**—So friendly is equity to the charitable trust that it will stretch its powers to the limit to sustain and carry out a charitable trust. The theory upon which this is done is known as the *cy pres* doctrine, these words meaning, roughly translated, "as nearly as possible." This doctrine is that, where the settlor of a charitable trust has created a trust which is unenforcible because of an imperfect statement of its purpose or because of the statement of an impossible or illegal purpose, equity will not allow the trust to fail, but will, because of its peculiar partiality to charitable trusts, enforce it for an object as nearly as possible like that of the settlor. This doctrine can be best explained by reference to the facts of an actual case. In Jackson v. Phillips[18] a testator gave property to trustees "for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in this country," and "for the benefit of fugitive slaves who may escape from the slave holding states of this infamous Union from time to time." The testator died in 1861, but shortly thereafter slavery was abolished and the executor sought the advice of the court as to the validity of the trusts

[17] 2 Perry, Trusts (6th ed.), § 706 and note.
[18] 14 Allen 539 (Mass.).

attempted to be created. The court held that, while the trust as originally created was a valid charitable trust, its enforcement exactly as planned by the settlor was then impossible, and the court would apply the *cy pres* doctrine and enforce it as nearly as possible. This was done by directing one sum to be used to promote the education, support and general welfare of freedmen and another for the aid of necessitous negroes in Boston and vicinity, preference being given to such persons as had escaped from slavery. Thus, the testator's intent was carried out as nearly as possible in the unforeseen circumstances.

This *cy pres* power of the court is of two kinds, the prerogative *cy pres* and the judicial *cy pres*. The former is in use only in England and there rarely. It is based on the authority of the crown, exercised through the court of chancery, to dispose of property, the subject of an unenforcible gift to charity. Thus, if the giver name no trustees, or the trustees named are dead, and the gift is made generally to charity, with no mention of specific forms, or if the gift be to a charity which is illegal at the time the settlement is made, equity will exercise the prerogative *cy pres* power and dispose of the gift for a valid charity. For example, the English courts have held that a gift of property to a trustee, who died before the trust could be enforced, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters," gave cause for the application of the prerogative *cy pres*.[19] And so a gift to a trustee

[19] Moggridge v. Thackwell, 7 Ves. 36 (Eng.).

to educate poor children in the Roman Catholic faith, being illegal in England, afforded another instance of the use of the prerogative *cy pres*.[20]

The judicial *cy pres* is the power more frequently used and is recognized in the majority of American states.[21] It is commonly exercised when there is either a gift to trustees for charitable purposes which are imperfectly described, or where the purpose of the trust cannot be carried out, due to a change in circumstances.[22] This *cy pres* power is one based on the authority of the court of equity and not a power delegated by the legislature or executive.

55. **The purposes of charitable trusts as affected by the rules against perpetuities and accumulations.** —In those states in which the rule against perpetuities is a rule that interests must not vest at too remote a period, the question as to the application of the rule to charitable trusts may arise in three ways. A gift to trustees for charity may be followed by a gift to an individual upon the happening of a contingency. It is generally held that the rule applies here and the gift to the individual will be void if the contingency may happen at too remote a time, that is, after the end of lives in being and twenty-one years. A gift to an individual may be followed by

[20] Cary v. Abbot, 7 Ves. 490 (Eng.).

[21] The judicial cy pres apparently is adopted in whole or part by legislation or as a part of the common law in Calif., Ill., Ind., Mass., Mo., N. H., R. I., Utah, Me., Ky., Ohio, Pa., N. Y., Conn., and Ga. It seems to be rejected in Iowa, S. C., Tenn., Ala., Del., N. C. and Wis. See, for a collection of authorities, 5 Amer. & Eng. Encyc. of Law (2d ed.), pp. 942, 943.

[22] For illustrations of its workings, aside from that given in Jackson v. Phillips, 14 Allen 539 (Mass.), see Dailey v. New Haven, 60 Conn. 314 and DeSilver's Estate, 211 Pa. 459; Darcy v. Kelley, 153 Mass. 433, LEADING ILLUSTRATIVE CASES.

a gift to a trustee for charity upon the happening of a contingency. In this case also it has generally been held that the rule applies and the gift over to the trustees for charity will be void if it may occur at a time later than the expiration of lives in being and twenty-one years. Lastly, a gift to trustees for charity may be followed by another gift to trustees for charity upon the happening of a contingency. Here there is an exception and the rule against perpetuities does not apply. The second gift to charity may be upon a contingency which may not happen till after lives in being and twenty-one years have expired.[23]

In those states where the rule against perpetuities means something entirely different, namely, that the power of alienation may not be suspended for too long a period, the exception with respect to charitable trusts is complete. Even though property be given to A under a trust for charity to last indefinitely and the interest of the beneficiaries is not alienable, both because of the statutes prohibiting alienation of the interest of a beneficiary and because the indefiniteness of the beneficiaries prevents alienation practically, yet there will be no violation of the rule against perpetuities and the charitable trust may go on forever. This is because the courts arbitrarily except this form of trust from the operation of the rule.[24]

With respect to the legality of provisions that the income of property given in trust for charity shall

[23] Gray, Rule Against Perpetuities (2d ed.), §§ 589-603i.

[24] Allen v. Stevens, 161 N. Y. 122.

be accumulated for an indefinite time, there is a conflict of opinion. The English courts have held that such provision for accumulation beyond the time allowed by the rule against accumulations is bad and the income must be paid to the charity as fast as it arises.[25] Some American courts have held that such accumulations will be allowed within limits to be prescribed in each case by the courts of equity. No interference with the accumulation will take place unless it is unreasonable, unnecessary and to the public injury.[26] In at least one American state the statute forbids accumulations for charity.[27]

[25] Harbin v. Masterman, (1894) 2 Ch. (C. A.) 184 (Eng.); (1895) A. C. 186. See generally Gray, Rule Against Perpetuities (2d ed.), §§ 679, 679a.

[26] St. Paul's Church v. Att'y General, 164 Mass. 188; Woodruff v. Marsh, 63 Conn. 125, 137, 138.

[27] St. John v. Andrews Institute, 191 N. Y. 254.

CHAPTER VII.

THE TRUSTEE — HIS APPOINTMENT, QUALIFICATION AND POWERS.

56. **The essential elements of a trust stated.**—In every true trust there is a settlor, property which is the subject-matter of the trust, a trustee and a cestui que trust or beneficiary. Having discussed the methods by which trusts are created and the purposes for which they may be and are formed, it is next necessary to consider separately each of the four essential elements of a trust and the powers, rights, duties and liabilities connected therewith. The settlor and subject-matter may be dismissed with a short discussion, but the trustee and beneficiary require fuller examination. The settlor or creator of a trust may be any person capable of making a contract, except in cases when the settlement is made by will, when, of course, the creator must satisfy the law with respect to the capacity to make wills. Thus, the federal government or any state government may create a trust. Infants may settle property in trust, but their settlements will be voidable at their option, just as their contracts are voidable. Married women are now generally relieved from their disability to convey property and hence may create trusts as freely as men or unmarried women. The property of a bankrupt is vested in his trustee in bankruptcy by the adjudication of bankruptcy. Hence the bankrupt cannot declare a

trust of property acquired before the bankruptcy. A corporation may create trusts in so far as they are within the powers given it by its charter or certificate of incorporation. The beneficiary of a trust may create a trust in his equitable interest. Aliens are now quite generally relieved from their disability to hold real property and to convey it, and may hence make a valid conveyance of it, as well as of personal property, in trust. The conveyance of property in trust by a lunatic or other person of deranged or feeble mind is treated as are the contracts of such persons. It is voidable only and, unless avoided, creates a valid trust.

The trust property may be property of any sort, real or personal, legal or equitable. It may be, for example, money, land, a bond, a mortgage, a claim against a bank or a stock of goods.[28]

57. **Who may be a trustee.**—Any person capable of taking and holding real and personal property may be a trustee. Of course, persons possessing such power may have defects which will cause a court of equity to remove them, but such power gives them the ability to become trustees. It is the prevalent view that the United States or a state may become a trustee, if it sees fit to accept a trust. The remedy of the beneficiary in such a case will be by petition, rather than suit, since the sovereign cannot be sued.[29] Aliens and married women are now generally capable of taking and holding all property and hence may become trustees. Non-residents, while discrim-

[28] 1 Perry, Trusts (6th ed.), §§ 28-37.
[29] 1 Perry, Trusts (6th ed.), § 41.

inated against in the appointment of trustees by the court, are not disqualified and a statute requiring trustees to be residents of the state is unconstitutional.[30] A corporation may be a trustee if the purposes of the trust are within the purposes for which the corporation was created. Infants and insane persons may become trustees, but their incapacity to perform binding acts will ordinarily cause equity to remove them. So, too, a bankrupt may become a trustee, for he has the capacity to take and hold property, but his financial irresponsibility will generally make expedient his removal by the court. The same person cannot be both sole beneficiary and sole trustee, because of the doctrine of merger, by which the legal and equitable estates unite when they come together in the same person. But one may be trustee for himself and others or may be one of several trustees for himself.[31] It is the policy of equity not to appoint as a trustee one who is defective or abnormal in any respect. Hence there is a presumption against the appointment of near relatives, who might be prejudiced, infants, women (in states where married women are under disabilities), bankrupts and such persons. Old age, drunkenness and friction have been considered sufficient causes for the removal of a trustee.[32]

58. **Trust will not fail for want of a trustee.**—It is a fundamental principle of equity that a trust will not be allowed to fail for want of a trustee. Hence

[30] Roby v. Smith, 131 Ind. 342.

[31] Burbach v. Burbach, 217 Ill. 547.

[32] Ames, Cases on Trusts (2d ed.), note, pp. 223, 224.

if no trustee be named, or none accept, or the trustee named is dead, or for any reason there is a vacancy in the office of trustee, but the trust is otherwise complete, equity will appoint a trustee and enforce the trust.[33] But, as has been seen, if the trust is a charitable trust and no trustee is named and the charitable purpose is only an indefinite, general one, equity will not enforce the trust in this country, and in England only by the use of the prerogative *cy pres* power.

59. **Appointment of the trustee.**—In so far as the appointment of trustees at the time of the creation of the trust relationship is concerned, the methods of appointment have been described in the chapter on the creation of trusts. It has been seen that, subject to the provisions of the Statute of Frauds and Statute of Wills, they may be appointed by any spoken or written expression of the creator of the trust, just as express trusts may be created in that way. It has also been seen that implied trustees are appointed or created by courts of equity. Thus the primary appointment of the trustee has been discussed. But there may be what might be called a secondary or substitutional appointment. The trustee named in the original trust instrument may die, or refuse to perform the trust duties, or resign after part performance, or be removed for incompetency or other cause. In such case there is necessity for the appointment of a new trustee. This appointment may have been provided for in the original trust instrument. The settlor may legally provide that he

[33] Adams v. Adams, 21 Wall. 185 (U. S.); In re Estate of Petranek, 79 Iowa 410, LEADING ILLUSTRATIVE CASES.

himself shall have the power to appoint the trustee in case of vacancy, or he may provide that a third person, neither settlor nor one of the trustees, shall have the power to fill vacancies in the trusteeship, or he may give to the surviving trustee or trustees the power of appointing the new trustee. If the original settlor does not provide for the filling of vacancies in any such way, a court of equity will make the appointment, selecting a person having no interest opposed to that of the beneficiary. So far as possible, persons laboring under a deficiency or bias, as infants, non-residents, persons financially irresponsible and persons already beneficiaries of the trust, will be avoided in filling the vacancy.[34]

60. **Acceptance or refusal by trustee.**—It has been seen that the acceptance or refusal of the trustee is immaterial, so far as the creation of the trust is concerned. The settlor may be bound and the property rendered trust property, even though the particular trustee named declines to accept the trust. Equity will fill his place. But the acceptance of the trust is necessary to fasten the trust duties upon a particular person. No man can be compelled to become a trustee. However, there is a presumption that a trustee accepts, and, when one is appointed a trustee and no evidence of acceptance or refusal of the trust appears, the trust will be considered accepted. Mere lapse of time is sufficient to create an acceptance, in the absence of any positive evidence of refusal or disclaimer.[35] Acceptance may take place by written

[34] Reigart v. Ross, 63 Wis. 449.

[35] Barclay v. Goodloe, 83 Ky. 493; Roberts v. Moseley, 64 Mo. 507.

statement, by joining in the execution of the trust instrument or by mere oral indication of assent. Acceptance may also be shown by acts aside from words. If the trustee take unqualified delivery of the trust instrument, or take possession of the trust property, or collect the income therefrom, or do any other act inconsistent with a denial of the trusteeship, the acceptance will be sufficiently shown. Where a trust is imposed upon an executor, the securing of the probate of the will is considered an acceptance of the duties of both executor and trustee. Because of the presumption in favor of acceptance, a disclaimer or refusal of a trust should be made promptly. Otherwise, acts may be done by the beneficiary or third parties which will estop the trustee from refusing. The disclaimer need not be under seal or even in writing. Any statement or act clearly showing an intent to refuse the duties of the trust is sufficient. A disclaimer by a trustee operates retroactively so that the situation is the same as if the disclaiming trustee had never been mentioned in the trust instrument. He is not a trustee from the time of his appointment until he disclaims, but his disclaimer relates back to the date of the creation of the trust and prevents it from having any effect as to the disclaiming trustee.[36]

61. **The trustee's bond.**—The settlor of a trust may expressly require the trustee to give a bond for the faithful performance of his duties. In such case the trustee cannot qualify without giving a proper bond. If the settlor makes no mention of a

[36] Goss v. Singleton, 2 Head 67 (Tenn.).

bond in the trust instrument, equity will require one from the trustee only when good cause is shown, such as that the trustee is wasting or threatens to waste the trust funds.[37] If the settlor expressly states in the trust instrument that the trustee shall not be required to give bond, it has been held that no bond may be required by the court under the circumstances.[38] But another court has intimated that a bond may be required, even in the face of this express exemption, if there "is a reason to apprehend that the safety of the fund requires it."[39] State statutes sometimes provide for the requirement of a bond, even if there be an exemption from the giving of one in the trust instrument, when the court thinks it proper.[40] The statutes of the various states frequently require that the trustee give bond.[41] Especially is this true in the case of trusts created by will. When the same person acts as executor and trustee, the giving of a bond as executor will not furnish security for the faithful performance of the duties as trustee. Where no bond has been given and one may properly be required, application should be made to the court of equity, or, in the case of a testamentary trust, frequently to the probate court, by a party interested, such as a beneficiary of the trust. The court will then, in a proper case, order the trustee to give a bond which will be subject to the

[37] Berry v. Williamson, 11 B. Mon. 245, 271 (Ky.).

[38] Ex Parte Kilgore, 120 Ind. 94.

[39] Ladd v. Ladd, 125 Ala. 135.

[40] Foss v. Sowles, 62 Vt. 221.

[41] McClernan v. McClernan, 73 Md. 283; Lackland v. Davenport, 84 Va. 638.

approval of the court as to its amount and the sufficiency of the sureties. Failure to give security when so ordered by the court does not defeat the trust, but constitutes sufficient ground for removal of the trustee.

62. **The powers of a trustee classified.**—A trustee has certain powers expressly given to him by the creator of the trust and others given to him by implication of law, without any express statement of them in the trust instrument. The former are also called special powers and the latter general powers. Express or special powers are divided into two general classes, namely, powers in trust or imperative powers, and naked or discretionary powers. Powers in trust must be exercised by the trustee, while discretionary powers, as their name indicates, may be exercised or not, as the will of the trustee dictates. If not exercised by the trustee, discretionary powers lapse and fail, while powers in trust will be exercised by the court if the trustee fails to carry them out. Whether a power expressly given to a trustee to rent real property, for example, is discretionary or imperative is a matter of construction. The intent of the creator will be ascertained from the trust instrument and surrounding circumstances and will then be followed.[42]

63. **The general or implied powers of a trustee.**—Equity implies such powers in favor of trustees as are reasonably necessary and incidental to the discharge of the duties given them by the trust instrument. What powers are so necessary and incidental

[42] 28 Amer. & Eng. Encyc. of Law (2d ed.), pp. 981-985.

is a question to be determined by the court in each case. The trustee has no implied power to make admissions binding upon the beneficiary.[43] He has implied power to waive formal matters; to have made such repairs to the trust property as are reasonably necessary and to pay for them out of the income of the trust property,[44] and even out of the principal, according to some recent decisions;[45] to insure the trust property and pay water rates and taxes upon it;[46] but he has no implied power to bind the trust estate by an executory contract, nor to compromise a claim owing to the trust estate.[47] But if the trustee compromises a claim in favor of the trust estate and the compromise would have been approved by a court of equity if application had been made to it, the court will allow or ratify the unauthorized act.[48] The trustee's implied powers do not include a power to make improvements of an extensive nature upon the trust property,[49] nor to borrow money upon the credit of the trust estate, without the consent of the court, except for short periods and in emergencies.[50] It is frequently said of the trustee that he has implied power to do what the court would order.[51] There is no implied power to sell, mortgage or lease the trust property, unless the terms of the trust clearly indi-

[43] Calwell's Ex'r v. Prindle's Adm'r, 19 W. Va. 604.
[44] Berry v. Stigall, 125 Mo. App. 264.
[45] 2 Perry, Trusts (6th ed.), pp. 784, 785.
[46] Bridge v. Bridge, 146 Mass. 373.
[47] Caldwell v. Brown, 66 Md. 293.
[48] Bacot v. Heyward, 5 S. C. 441.
[49] McKinley v. Irvine, 13 Ala. 681, 705.
[50] Warren v. Pazolt, 203 Mass. 328, 349.
[51] 28 Amer. & Eng. Encyc. of Law (2d ed.), pp. 982, 983.

cate that the settlor must have intended a sale, mortgage or lease. Thus, if the settlor create a trust in real property and direct the trustee to manage it and to deliver the net income to A during his life, a power to lease the real property would be implied. No express mention of it would be necessary. A power to mortgage is not implied from an express power to sell the trust property.[52] There is a general or implied power to sue upon causes of action accruing to the trust estate during the existence of the trust.

64. **The more common express powers of a trustee.**—A trustee is very commonly authorized by the trust instrument to sell the trust property for some purpose, as, for example, to pay the debts of the settlor or to pay legacies. The time and manner of conducting the sale and the terms to be accepted may be expressly stated by the settlor. If that be so, they should be implicitly followed. The power of sale may also be expressly conferred upon the trustee by an order of a court. This will be done only in cases where the needs of the beneficiary require the sale or some advantage to the trust estate can be gained by a sale.[53] To make such an order for sale it is, of course, necessary that the court have jurisdiction of the trust property and that all persons interested in the trust be made parties to the proceeding. A sale by order of court should be confirmed by the court to insure its validity. If no method of sale is prescribed by court order or trust instrument, the trustee should use his discretion as to the time, place and manner

[52] Willis v. Smith, 66 Tex. 31.

[53] Alemany v. Wensinger, 40 Cal. 288.

of sale. Any fair sale, either private or public, will be satisfactory. The consent of the beneficiaries is not necessary to make the sale valid where the trustee has a power of sale, but the consent of the beneficiary or of any other person may be made by the settlor a condition precedent to the exercise of the power. The terms of the sale may be such as the trustee determines in the exercise of a fair discretion, unless they are fixed by the settlor or the court. The sale may be either upon credit or for cash. The power to sell does not include the power to exchange. Hence, the property received as consideration for the sale must be money or a promise to pay money.[54]

A sale made by a trustee in pursuance of a power expressly given is presumed to have been validly made. The burden is upon the party attacking its validity to show cause.[55] A sale under a trustee's power which is tainted with fraud on the part of the buyer may be set aside by the beneficiary on application to a court of equity. As seen in the sections on constructive trusts, if the trustee himself directly or indirectly becomes the buyer at the sale of the trust property, the sale is voidable at the option of the beneficiary. Because of the official character of the seller, there is no implied warranty of the title of personal property sold at a trustee's sale. There is, of course, no implied warranty of the title of real property so sold. The buyer takes exactly what the trustee had by way of title and nothing more. The

[54] Ringgold v. Ringgold, 1 Har. & G. 11 (Md.).
[55] Gardner's Appeal, 81 Conn. 171.

deed or bill of sale should be executed by the trustee as trustee and not merely in his individual capacity.

Another common power expressly given to the trustee is that to mortgage the trust property. It may be conferred by direction of the settlor or by order of court, if a showing of necessity or advantage to the trust estate from a mortgage is made. Although the mortgage is not authorized, if the beneficiary consent to it, the mortgage will be binding upon the trust estate. The mortgage, if made, should be for a purpose authorized by the trust instrument or order of the court and should be executed by the trustee as trustee. The power to lease property is frequently given to the trustee by the settlor or by order of court. It is subject largely to the rules mentioned above with respect to sales and mortgages. The power of investment of the trust funds is one often given expressly to the trustee. The proper conduct of the trustee in making investments will be considered later herein under the head of the duties of the trustee.[56] Settlors frequently give to their trustees the power of filling vacancies in the trusteeship or of appointing their successors.

65. **Powers of joint trustees.**—If there are two or more trustees, they are considered as one person. They hold the trust property by joint tenancy and are a unit in the eye of the law. For that reason joint trustees must join in every act with relation to the trust which requires the use of any discretion. If the trust property is to be leased, the whole number of the trustees must join in the lease. A major-

[56] See § 70, post.

ity of them cannot bind the others.[57] Of course, the trust instrument may expressly authorize a majority of the trustees to act for all and then such action will be proper. But the general rule is that all must unite in every act. There is an exception, however, in the case of public trusts. Thus, where five commissioners were appointed to assess the depreciation of property in a town due to the removal of the county seat, it was held that three of them might act and bind the others.[58] And in ministerial acts, such as the receipt of money due upon a mortgage, or other acts requiring no discretion, one trustee may act for all.[59] A few courts have expressed the opinion that, in cases of great emergency, one trustee may act in matters of discretion for all.[60] One trustee's act on behalf of all, even though unauthorized, may become valid by a subsequent ratification of it by the other trustees. Since trustees hold as joint tenants, upon the death of one, unless the trust powers were in some way made personal by the settlor, the survivors become vested with all the trust powers and they may exercise them without the acquiescence of the representatives of the deceased trustee. And so, with a similar qualification as to purely personal powers, if one of several trustees disclaims the trust and refuses to act, those who accept it may exercise all the powers of the trust, although they do not constitute all the trustees named by the settlor.

[57] Golder v. Bressler, 105 Ill. 419, 434.

[58] Beall v. State, 9 Ga. 367.

[59] Bowes v. Seeger, 8 W. & S. 222 (Pa.).

[60] Busse v. Schenck, 12 Daly 12 (N. Y.), Vandever's Appeal, 8 W. & S. 405 (Pa.).

66. **Delegation of trust power.**—In the performance of his ordinary duties a trustee is in a peculiarly confidential relationship. His own prudence and skill are relied upon by the settlor. Hence, he is required to exercise personally all the trust powers in which any discretion is involved. He will not be allowed to appoint an agent or attorney to exercise such powers as that of selling the trust property.[61] It has been stated, however, that even such discretionary duties may be delegated if all parties interested consent.[62] And if an agent of the trustee performs a discretionary act, it will become binding if the trustee ratifies and approves it by subsequent conduct.[63]

In one case where the trustee was incapacitated to perform arduous duties, the court appointed an agent to exercise the active duties of the trust for him.[64] But the expediency of this seems doubtful. The trustee should be removed and a new one appointed in such a case. If the trustee delegate his discretionary powers, he will become personally liable for any injury to the trust estate. The trustee may, however, delegate to others powers which are merely ministerial, that is, which require no discretion. For example, a trustee may employ another to post notices and carry on the details of a public sale, when the trust places upon him the duty of selling property to pay debts, although he could not delegate the power to decide when and how the sale

61 Mason v. Wait, 4 Scam. 127 (Ill.).
62 Seely v. Hills, 49 Wis. 473.
63 Newton v. Bronson, 13 N. Y. 594.
64 Franklin v. Franklin, 2 Swan 521 (Tenn.).

should be made.[65] The trustee must exercise the power of sale as to all matters of discretion, but may entrust to an agent the matters of mere routine requiring no judgment.

[65] Johns v. Sergeant, 45 Miss. 332.

CHAPTER VIII.

THE TRUSTEE—HIS DUTIES, RIGHTS, LIABILITIES AND REMOVAL.

67. **The Trustee's Duties—(a) To execute the trust.**—It goes almost without saying that the trustee owes to the beneficiary the duty of prudently and skillfully carrying out the trust as it is stated in the trust instrument. Thus, if A devise property to B in trust to collect the rents and profits thereof and pay them to C during his life, it is obviously the most elementary duty of B to procure such rents and profits and, after deducting the necessary expenses, pay them to C. Such duties might be called the express duties of the trustee. There are, however, certain duties which the trustee owes the beneficiary equally, but which are not usually fully expressed in the trust instrument. Some of these duties are of a negative character, that is, to refrain from doing certain acts, and others are of an affirmative character, that is, to perform certain acts. These various duties will now be considered.

68. **Same subject—(b) Negative duties.**—The trustee owes to the beneficiary the duty not to delegate to agents or servants the performance of the discretionary duties of the trust. The trustee was presumably appointed because of some peculiar trustworthiness or ability, and to these qualities the

beneficiary is entitled in the administration of the trust. The substituted action of the trustee's possibly incompetent agent will not do.

The trustee also owes to the beneficiary the duty not to make any profit from the trust. The trustee, as will be shown hereafter, is entitled to compensation for his services and that is all the benefit he is expected to derive from the trust. If, for instance, he can obtain a commission for awarding a contract connected with the trust estate to a certain person, he is not allowed to take such commission, even though the contract to be awarded therefor is perfectly fair and honest. And if the trustee take such commission, he will be obliged to hold it for the beneficiary. To use the trust funds or other property for his own advantage, even though they are temporarily not needed for the purposes of the trust, is not a proper act for the trustee. His whole object should be to further the interests of the beneficiary and anything which hinders him, or might hinder him, from forwarding the interests of the beneficiary is discouraged by equity and is a breach of the trustee's duty.[66]

The trustee owes the beneficiary the further duty not to purchase the trust property or an outstanding claim against it. The reason behind this prohibition is similar to that mentioned as the basis of the duty not to take a profit from the trust. If the trustee were allowed to purchase the trust property on a sale of it, he would be under strong temptation to make the sale at an improperly low figure. The

[66] Jarrett v. Johnson, 116 Ill. App. 592.

trustee's private interest would conflict with his representative interest. He would naturally favor himself over the beneficiary. Hence he is held by equity to owe the beneficiary a duty to refrain from such transactions entirely, and, if he buys the property at his own sale, he may, at the option of the beneficiary, be held a constructive trustee thereof for the beneficiary.[67] And so, too, the same principle is applied to purchases by the trustee of interests in the trust property which are less than the full title. If the trustee purchase a mortgage on the trust property or the interest of one who claims the property adversely to the trust, he will hold the mortgage or adverse claim for the benefit of the cestui que trust.[68]

69. **Same subject—(c) Custody of the trust property.**—The trustee's first positive duty toward the beneficiary is to assume possession of the property which is the subject-matter of the trust. Included within this duty is his obligation to collect at once all debts due the trust estate. Often the subject matter of the trust consists partly or wholly of bonds, notes, or book accounts. For any loss occasioned by his failure to take charge of and reduce to possession such assets, the trustee will be personally liable.[69]

Having once obtained actual possession of the trust property and reduced to money so much of it as consisted of notes and such claims, the trustee

[67] Hayes v. Hall, 188 Mass. 510, LEADING ILLUSTRATIVE CASES.
[68] Taylor v. Calvert, 138 Ind. 67.
[69] Cross v. Petree, 10 B. Mon. 413 (Ky.).

should then use reasonable care in the keeping of the property. He should, first of all, keep it separately from his own property and for any losses due to mixture he may be held liable.[70] It is not necessary that he retain the entire trust property in his own actual possession. He may leave it in safety deposit boxes or in the care of agents or attorneys when the nature of the property and the needs of the trust so require. Thus, it will be more often the duty of a trustee to retain in his own possession negotiable paper and other easily transferrable property, than to keep actually in his own house non-negotiable property which is needed at another place frequently.[71]

70. **Same subject—(d) The investment of the trust funds.**—Where any considerable amount of money remains long in the trustee's hands it is his duty to invest it and obtain a profit for the beneficiary. The time within which he should make this investment depends upon the amount of money which he has and the opportunity for investment. If he delays unduly long and the beneficiary thereby loses, the trustee will be held liable for interest upon the sum in his hands.[72] The trust fund may be invested at the time it comes into the possession of the trustee. It may consist of stocks and bonds rather than of money. It is ordinarily not the duty of the trustee to change investments of trust moneys. But there will be such a duty if the fund is laid out in

[70] Wagner v. Coen, 41 W. Va. 351.
[71] Field v. Field, L. R. 1894, 1 Ch. 425 (Eng.).
[72] Siechrist v. Bose, 87 Md. 284.

investments which a prudent man ought to know are unsafe. If the trustee, after a reasonable time, does not change obviously unsafe investments, and a loss results to the trust estate as a consequence, the trustee will be personally liable therefor.[73]

Again, the settlor may direct that the trust moneys be invested in certain securities. In this case it is the duty of the trustee to follow such directions implicitly, regardless of his own judgment. He will be liable for any loss suffered if he fails to follow the directions of the settlor. The degree of care which the trustee is bound to exercise in making trust investments is described by one court as follows: "The trustee is bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own like affairs."[74] The trustee, in seeking a proper investment, should not select property owned by himself privately, or in which he is interested. Such an investment would place the trust estate liable to loss through the conflict of private and representative interest. Nor should the trustee use his own funds in combination with trust funds to make an investment. The trust investment should be separate.[75]

The trust investment should be in the name of the trustee as trustee. If made in the name of the trustee privately, the beneficiary may hold the trustee liable for any loss suffered through the investment,

[73] Ward v. Kitchen, 30 N. J. Eq. 31.
[74] King v. Talbot, 40 N. Y. 76, 85, 86.
[75] McCullough v. McCullough, 44 N. J. Eq. 313.

even though it were made with due care and diligence. In general, the trustee should follow the rule of investing only within the jurisdiction where the trust is to be administered, but in exceptional cases he may buy property located in a foreign state.[76]

The bonds of the United States or of any of the states are generally regarded as proper for trust investments. First mortgages on real estate, if a reasonable margin of security is allowed, are good trust investments. A safe margin upon farm property exists when the loan is up to two-thirds of the value of the property. In loans upon city property the amount should not exceed one-half the value of the property.[77] Second mortgages on real estate are not allowed as trust investments. The purchase of real estate outright is regarded unfavorably as a trust investment, because of its aptitude to be unproductive, fluctuating in value, and difficult to dispose of. Hence, except in unusual circumstances, it is improper for a trustee to invest trust funds in land.[78] Personal securities, that is, unsecured notes and bonds of private persons and corporations, are not allowable trust investments, even though the maker be solvent and financially responsible. They are too uncertain. The maker may die or suffer reverses.[79] The stock of a manufacturing or trading corporation is, as a general rule, a poor form of investment for trustees, since it is apt to be unproductive. But in some American states stock investments have been

[76] Matter of Denton v. Sanford, 103 N. Y. 607.
[77] In re Salmon, 42 Ch. Div. 351 (Eng.).
[78] Williams v. Williams, 35 N. J. Eq. 100.
[79] Vreeland v. Vreeland's Adm'r, 16 N. J. Eq. 512.

allowed when discretely made.[80] It is obvious that the investment of trust funds in business or speculation is improper. The rights of the beneficiary cannot lawfully be laid open to such risk.[81]

The trustee may deposit trust moneys for a short time in a bank, but he is not expected to leave them there longer than a time reasonably sufficient to find a good investment for them. Hence, when he allows them to remain thus idle for too long a time, as for fourteen months, the trustee will be liable for the amount of the deposit when the bank fails.[82] And if he deposit the money in his own name he will also be liable for its loss.[83] If the securities in which the trustee invests depreciate, without fault on his part, he is not liable for the loss.

In a number of states there is statutory control of the investments of trust funds.[84] The effect of these statutes is generally to enlarge the field of investment open to trustees and to allow the purchase of federal or state bonds, real estate securities, and approved municipal and railroad bonds. The acquiescence of the beneficiary in the investment of trust funds in an improper security may relieve the trustee from liability for loss thereby.[85]

If the trustee makes any gains on improper investments, he will hold such gains for the beneficiary, or, at the beneficiary's option, the beneficiary

[80] In re Dickinson's appeal, 152 Mass. 184.

[81] Warren v. Union Bank, 157 N. Y. 259.

[82] Cann v. Cann, 33 Weekly Rep. 40 (Eng.).

[83] In re Arguello's Estate, 97 Cal. 196, LEADING ILLUSTRATIVE CASES.

[84] See 39 Cyc. 394, 395, and Ames, Cases on Trusts (2d ed.), note, p. 486, for references to the statutes of the various states.

[85] Matter of Hall, 164 N. Y. 196.

may claim the amount of the original trust fund with interest. The interest allowed to the beneficiary in case of failure to invest or improper investment is usually simple interest at the legal rate. The effect of a breach of the trustee's duty with respect to investments will be considered more fully hereafter,[86] but in general it is to make the trustee personally liable to the beneficiary for the amount of the principal of the investment, with interest thereon.

71. **Same subject—(e) Possession and control of the trust property.**—Wherever the trust is active, that is, the trustee has duties to perform, it is obvious that the trustee must have possession of the trust property. Hence it is the general rule that the beneficiary of an active trust is not entitled to demand of the trustee possession of the trust property.[87] But if the trust is passive the beneficiary is then entitled to actual possession.

Even though the trust is active, the English cases and several cases in this country, allow the beneficiary to demand of the trustee a conveyance of the trust property. The theory of these cases is that the beneficiary is practically the owner of the trust property and the trust is solely for his benefit. Therefore he ought to be allowed to have the legal estate transferred as he likes. Upon this theory it has been held that where a testator gave to a trustee stocks to be delivered to a beneficiary at twenty-five, the beneficiary was entitled to a transfer of the stocks at twenty-one. He was absolute owner and the only

[86] See §§ 79, 84.

[87] Tidd v. Lester, 5 Maddock 429 (Eng.); Davis v. Hunter, 23 Ga. 172.

person interested. The intent of the testator was not respected.[88] And this duty of the trustee to convey on the beneficiary's demand has been asserted in some American cases.[89] But other American courts have held that, if the trust is active, even though all the beneficiaries join in a demand for a conveyance to them or their nominees, it is not the duty of the trustee to make any conveyance except according to the terms of the trust.[90] The beneficiaries cannot destroy the trust. In one state the matter is now regulated partially by statute.[91]

72. **Same subject—(f) To give information and account.**—The trust exists solely for the benefit of the cestui que trust and he has a right to know in what the trust funds are invested, how much of principal and income the trustee has on hand, what are the expenses of administration, and all such matters of business connected with the trust. It is the duty of the trustee to keep records which will enable the administration of the trust to be traced and to display such records to the beneficiary at his request. And so the trustee should allow the beneficiary to inspect all documents in his possession connected with the trust estate, such as deeds, contracts, and legal opinions.[92]

Trustees are under a duty to render accounts of their proceedings to the beneficiary when such accounts are necessary or useful to the beneficiary.

[88] Saunders v. Vautier, 4 Beav. 115 (Eng.).
[89] Huber v. Donoghue, 49 N. J. Eq. 125.
[90] Clafin v. Clafin, 149 Mass. 19; Cuthbert v. Chauvet. 136 N. Y. 326.
[91] New York Personal Property Law, § 23.
[92] In re Tillott, L. R. (1892), 1 Ch. 86 (Eng.).

Whether such accounts are necessary and useful is decided by the court upon the facts of each individual case. It depends upon the condition of the trust. If the trustee has committed a breach of trust and the trust property is in danger, an account will be more readily ordered than if the trustee has been faithful and no emergency has arisen.[93] Often the state statutes provide that trustees shall render accounts at annual or other regular intervals.

The account may be demanded at a proper time by anyone having a legal interest in the administration of the trust. Within this class are included beneficiaries and their creditors, representatives of deceased beneficiaries and remaindermen, entitled to the property after the end of the trust. The account may be demanded, not only against the trustee, but against his representatives in case of his death, or against his successor. The account may be obtained generally in a court of equity, although in some states the probate courts have concurrent jurisdiction with courts of equity over trusts created by will.[94] The accounting may be voluntary, that is, at the request of the trustee, or involuntary, that is, upon the motion of the beneficiary or other interested party.

Upon this accounting the trustee should be charged with all the property which he has received, both originally upon the acceptance of the trust and as income and profit from such original property. The trustee will also be held liable for property which he would have received, had he been diligent in per-

[93] Wilson v. Kent, 38 Colo. 492.

[94] For example see 39 Cyc., pp. 470, 471.

forming his duties. For example, if he received as a part of the original trust property a promissory note which he could have collected by prompt action, but, at the time of the accounting, the note is uncollected and uncollectible, the trustee will be charged with the amount of the note.[95] And so, too, the trustee must be held liable for property lost through his neglect, though once in his possession. If he mingle the trust funds with his own, or use the trust funds for private purposes, or commit any other breach of trust, and a loss results, the trustee must account for the lost property, even though he has been careful and prudent in other respects. The trustee will be liable for all interest and other income actually received and also for such interest and income as he would have received, had he been reasonably diligent. Thus, if trust money has been idle, due to his neglect to invest, the trustee may be charged with interest on it upon the accounting.[96]

The trustee is entitled to be credited in his account with all expenditures which he has actually and necessarily made. Under such head will come the expenses of the employment of necessary clerks, stenographers, and attorneys, the sums paid out for the repair of the trust property, tax, and insurance bills, payments made to the beneficiaries and advances made to the trust estate out of the trustee's own pocket.[97] These disbursements should be proved by vouchers and not merely by the testimony of the

[95] Hunt v. Gontrum, 80 Md. 64.

[96] Mathewson v. Davis, 191 Ill. 391.

[97] Marks v. Semple, 111 Ala. 637; Ingham v. Lindemann, 37 Oh. St. 218.

trustee. The trustee may be freed from the burden of accounting if the beneficiary has, when of full age and sound mind, released the trustee. But such a transaction must be attended with the utmost good faith on the part of the trustee and will be closely scrutinized by equity.

73. **The trustee's rights.**—The two principal rights of the trustee are his rights to reimbursement for expenditures made for the trust and his right to compensation for his services. If the trustee expend from his own funds any sum for the payment of valid debts of the trust estate, or for necessary repairs to the trust property, or for the employment of necessary aid in the administration of the trust, or similar legitimate trust expenses, he is entitled to have such amount repaid to him out of the trust funds. And for the repayment of this money he has an equitable lien on the trust property, that is, he can hold the trust property as security for the repayment of his advances and if they are not repaid may sell the trust property to secure such repayment.[98]

The English rule is that the trustee is not entitled to compensation for his services, but the general American rule is contra. In this country quite commonly courts of equity fix the compensation of trustees and exercise a wide discretion in so doing. The compensation of the trustee may be provided for in the trust instrument or by contract between the settlor and the trustee. In that case, by the acceptance of the trust, the trustee will become bound to be satisfied by the amount there specified. Or the

[98] King v. Cushman, 41 Ill. 31.

compensation of the trustee may be fixed by statute. This is the case in a number of American states.[99] However, if there is no such arrangement for compensation, the court of equity fixes the amount of recompense to be given the trustee.[1] Even though the compensation is fixed by statute, equity will regulate the award within the statutory amount, according to the merits of the case. It may award less than the statutory limit.[2]

In fixing the compensation equity considers the diligence and fidelity with which the trustee has performed his duty, the amount of time spent by him on the labors of the trust, the amount of property, and consequently of responsibility involved, the condition of the property at the time and the effect of the services of the trustee upon that value. The amount awarded to the trustee for his work is usually called his commission. It is generally fixed on a percentage basis, reckoning upon the amount of trust property received and disbursed by the trustee.[3]

The commissions of the trustee are usually paid to him at the time of his accounting. The trustee may waive his right to compensation expressly or by acts showing that he does not intend to insist upon it. He may also forfeit his compensation for fraud or intentional breach of trust.[4] But one com-

[99] 39 Cyc. 482.

[1] Premier Steel Co. v. Yandes, 139 Ind. 307; Maginn v. Green, 67 Mo. App. 616.

[2] Gibson's Case, 1 Bland 138 (Md.).

[3] In re Estate of Gloyd, 93 Iowa 303.

[4] Newton v. Rebenack, 90 Mo. App. 650.

mission is allowed to joint trustees. It must be apportioned between them according to the value of their services.[5] The commission of the trustee is payable out of the income of the trust under ordinary conditions, but if the income be insufficient, the principal may be charged.[6] In this country, as distinguished from England, a trustee is entitled to compensation for professional services, such as those of an attorney, rendered to the trust estate, in addition to his commissions.[7]

74. **The trustee's liabilities—(a) For his own acts or omissions.**—The trustee's liabilities are of three classes, namely, those arising from negligence, misconduct and contract. If the trustee is guilty of such carelessness with respect to the management of the trust property that he is not acting as an ordinarily careful and prudent man would act in the same circumstances, then he will be liable personally for any loss resulting from such carelessness. Of course, if the trustee commits a positive breach of trust, that is, does an affirmative act in contravention of the trust, he will be similarly liable. These two forms of liability are generally to the beneficiary. A third sort may exist in favor of third persons by virtue of an express or implied agreement made by the trustee.

Because of the general rule exempting the trustee from liability to the beneficiary for his acts as long as he uses ordinary care and refrains from positive wrongs, it is law that, if the trust property depre-

[5] Matter of Johnson, 170 N. Y. 139.
[6] Biddle's Appeal, 83 Pa. St. 340.
[7] Perkins' Appeal, 108 Pa. St. 314.

ciate in value without carelessness or wrongdoing by the trustee, the loss will fall on the beneficiary. And so, also, if the trust property is stolen from the trustee or his agent without his fault, the trustee is absolved from all liability. Destruction by fire which is caused by no negligence or misdeed of the trustee likewise relieves him from responsibility to the beneficiary for the trust property.[8] Thus, if he has done his best and exercised ordinary prudence, a mistake or error of judgment in buying property for the trust estate or in selling the trust property will not cause the trustee to incur any liability to the beneficiary. The trustee is not expected to be infallible, nor to insure the safety of the trust property.[9]

The negligence which will render the trustee liable for damages suffered by the trust estate may occur in a great variety of ways. Only a few typical cases can be mentioned. The trustee's duty to collect the assets of the trust estate has been previously mentioned.[10] If he has an option as to the form in which the trust fund shall be delivered to him and he negligently chooses to take it in improper securities, he will be liable for the loss resulting. And so, too, if, after obtaining the trust property, he carelessly fails to collect such part of it as consists of claims against others, the trustee must suffer.[11]

The trustee's duty with respect to investments has been discussed.[12] He is not liable for a loss to the

[8] Cromie v. Bull, 81 Ky. 646.
[9] Harkness v. Scammon, 48 Mo. App. 136.
[10] See § 69.
[11] Waterman v. Alden, 144 Ill. 90.
[12] See § 70.

trust estate caused by the failure of his investments to prove sound or profitable, unless he has manifested some lack of care or some misconduct with respect to them.

Thus, if he has taken a first mortgage on real estate with ample margin of security, but property in that neighborhood has decreased in value, due to circumstances which could not be foreseen, the trustee is not responsible for the shrinkage. But if he places trust moneys in stocks, a form of investment not generally allowed by equity, then, no matter what his intention or how good his judgment, he must stand the loss, if there is any. If the bank in which the trustee has placed trust funds fail, and he used reasonably good judgment in placing the money there, he will not be responsible, unless the deposit was in his own name privately, and then only when the bank had no knowledge of the fiduciary character of the fund.[13]

So, too, if the trustee carelessly perform his duty to keep accounts, or to have the trust property repaired, or to pay taxes upon it, or carelessly pay the trust funds to persons not entitled to them as beneficiaries, he will be liable.[14] The negligence of the trustee or his agent in managing the trust property may also render the trustee liable to persons other than the beneficiary. For example, a careless failure to keep the trust property in repair which causes physical injuries to a person properly upon the prem-

[13] Crane, Boylston & Co. v. Moses, 13 S. C. 561; Parsley's Adm'r. v. Martin, 77 Va. 376.

[14] Thiebaud v. Tait, 138 Ind. 238.

ises, gives rise to a cause of action against the trustee personally.[15]

If negligence makes the trustee liable, of course intentional misconduct will so result. Wilful breaches of trust are of various kinds. They range from a conversion of the trust funds to the use of the trustee to the mere doing of acts not authorized by the trust instrument. If the trustee knowingly does an act which contravenes the purposes of the trust, or is a breach of his duty to the beneficiary in any way, he is liable for the damage resulting to the trust estate.[16]

It is obvious that the trustee's negligence or misconduct may be excused and his liability therefore prevented, if the beneficiary consent to the performance of the acts in question. But this consent must be given freely and openly, while the beneficiary is of full age and of sound mind. It will be scrutinized carefully by the court.[17]

The damage actually done to the trust estate is naturally the measure of the trustee's liability in these cases of negligence or misconduct. For instance, if the fund has been wholly lost, the trustee must replace it; but, if it is merely placed in a poor investment, the difference between the amount invested and the present value of the investment will measure the damage, unless the beneficiary exercises the option which he has to avoid the whole investment and hold the trustee liable for the amount originally invested.

[15] O'Malley v. Gerth, 67 N. J. L. 610.
[16] Hart's Estate, 203 Pa. St. 488.
[17] Dyer v. Riley, 51 N. J. Eq. 124.

"The general rule is well settled in this state that executors and trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon the contract or obligation of the testator."[18] Trustees are not allowed conclusively to bind their beneficiaries by executory contracts, but are expected to assume a personal liability for the property or services furnished and then to receive permission to charge the trust estate upon the accounting, when the beneficiary will be present and have an opportunity to object to the expenditure. But if the trustee is insolvent or absent from the state and the trust estate has received the benefit of the contract, the trust estate may be held directly for the debt.[19] But the trustee may stipulate that he shall not be individually liable, if he can obtain the consent of the other party to such a contract.

75. **The trustee's liabilities—(b) For the acts and omissions of his co-trustees and agents.**—The general American rule is that a trustee is liable only for his own neglect or misconduct, unless he co-operates with or connives at wrongdoing on the part of his co-trustee.[20] Mere passivity will not render the trustee liable for the wrongdoing of the co-trustee. "If he is merely passive and simply does not obstruct the collection by his associate, he is not liable for the latter's

[18] O'Brien v. Jackson, 167 N. Y. 31, 33.
[19] Norton v. Phelps, 54 Miss. 467.
[20] Stowe v. Bowen, 99 Mass. 194.

waste, if guilty of no negligence himself. But where one executor or trustee receives the funds of the estate and either delivers them over to his associate or does any act by which the funds come under the sole possession and control of the latter, and but for which he would not have received them, the executor or trustee is liable for the loss which is sustained in consequence of such action."[21] Failure to interfere in a known breach of the trust and permitting a wrongdoing co-trustee to take the entire management of the property have been held to make the trustee liable.[22]

If trustees are jointly liable for negligence or wrongdoing and recovery is had against one for the whole amount of damages, he may sue the co-trustee and obtain from him the share which he should have paid. The trustee who has paid has a right of contribution.[23] Unless a trustee is negligent in the selection or retention of agents, or delegates to them discretionary duties, he is not liable for their negligence or misconduct.[24]

76. **The removal of the trustee.**—The trustee may be relieved from his duties on his own application. He may resign. If he acts without compensation, he is entitled to resign at any time and the court of equity must relieve him of his duties, no matter what reason he gives for his resignation.[25] But if the office

[21] Bruen v. Gillet, 115 N. Y. 10, 14-15.

[22] Smith v. Pettigrew, 34 N. J. Eq. 216; Royall's Adm'r v. McKenzie, 25 Ala. 363.

[23] Sherman v. Parish, 53 N. Y. 483, 489.

[24] Anderson v. Roberts, 147 Mo. 486.

[25] Bogle v. Bogle, 3 Allen 158 (Mass.).

is one of profit to the trustee and he has once accepted it, he cannot be freed from the duties of the position whenever he desires. He must present his resignation to the court with a statement of sufficient cause for the resignation, or with proof that all interested parties consent to it.[26] If the interests of the trustee and beneficiary are hostile, or they are incapable of getting along with each other, or the trustee is incapacitated from doing his work because of illness, or some other good reason appears, the court will accept the resignation. But the trustee cannot shake off the trust at will. The proceeding for the acceptance of the resignation is in a court of equity. Costs will be awarded against the trustee, unless the reason for the resignation is particularly meritorious.[27]

In addition to a voluntary removal or resignation, there may be an involuntary removal of the trustee. The right to make this removal may be vested by the settlor of the trust in anyone. It always exists, regardless of the provisions of the trust instrument, in a court of equity, and in some states to a certain extent in courts of probate.[28] The removal of the trustee is highly in the discretion of the court of equity. No definite rules can be laid down as to when the removal will be decreed and when not. Equity will not remove except for some serious reason. Mere bad judgment or a single instance of incompetence will not be enough. But the removal has been made for such causes as incapacity of the trustee, due to

[26] Diefendorf v. Spraker, 10 N. Y. 246.

[27] Richmond v. Arnold, 68 Atl. 427 (R. I.).

[28] Chambers v. Mauldin, 4 Ala. 477; for references to statutes see 39 Cyc. 266.

old age, ill health, drunkenness or insanity; insolvency or bankruptcy of the trustee; removal to a foreign jurisdiction; a breach of the trust through fraud or dishonesty; hostility and discord between the trustee and beneficiary; disobedience to the orders of the court.[29]

The trustee may also, of course, be removed by his death. If the deceased trustee was one of several, the title to the trust property and the trust duties pass to the surviving trustees because trustees hold as joint tenants.[30] If the deceased trustee was originally the sole trustee or had become such by the death of his co-trustees, at common law the title to the trust property vests in the heirs at law or next of kin of the deceased trustee, dependent upon the nature of the trust property, whether real or personal.[31] By statute in a number of states, such as New York, Wisconsin, Indiana and Kansas, the trust now vests in the court having general equity jurisdiction upon the death of a sole trustee.[32]

[29] Gartside v. Gartside, 113 Mo. 348; Quackenboss v. Southwick, 41 N. Y. 117; See note, Ames, Cases on Trusts (2d ed.), p. 223.

[30] Reichert v. Mo. & Ill. Coal Co., 231 Ill. 238.

[31] Woodruff v. Woodruff, 44 N. J. Eq. 349.

[32] Royce v. Adams, 123 N. Y. 402; Reigart v. Ross, 63 Wis. 449; 1 Perry, Trusts (6th ed.), § 341.

CHAPTER IX.

THE BENEFICIARY—HIS CAPACITY, ACCEPTANCE, RIGHTS AND LIABILITIES.

77. **Who may be a beneficiary.**—The word "object" is sometimes used in a technical sense as equivalent to beneficiary or cestui que trust. Generally speaking the capacity to take and hold property determines the capacity to be the beneficiary of a trust. Any natural or artificial person capable of owning property can be a cestui que trust. Thus, the crown in England or a state or the federal government in America may be the beneficiary of a trust.[33] The capacity of corporations to be beneficiaries depends on the corporate powers granted by the legislature. Aliens were under a disability at common law with respect to the holding of real property, and it was therefore held that they could not be the beneficiaries of trusts of real property.[34] But they might hold personal property, and a trust of real property to be sold and converted into money for their benefit was sustained under the doctrine of equitable conversion. It is now law in a great majority of American states that aliens have rights equal to those of citizens with respect to the holding of real and personal property. Hence they may generally be beneficiaries of trusts without restriction.

[33] Neilson v. Lagow, 12 How. 98 (U. S.).

[34] Leggett v. Dubois, 5 Paige's Ch. 114 (N. Y.).

Trusts for married women, infants and incompetents are, of course, valid. They can take and hold property, although restricted now or formerly in their capacity to contract with reference to it. Indeed, in some American jurisdictions trusts are valid only for minors, incompetents and spendthrifts.[35]

"It may be laid down as a general proposition that it is not necessary, in order to create a trust estate, that a cestui que trust should be named who is in being. * * * A trust may be valid and effectual, where a trustee is named, although the cestui que trust may not then be *in esse,* provided such cestui que trust came into being."[36] Thus, a trust for the children of A now in being or to be born is valid. Afterborn children will be let in as beneficiaries.[37] The settlor may himself be a beneficiary, subject to the claims of creditors. The trustee may, with other persons, be a beneficiary, but cannot be sole trustee and sole beneficiary because of the doctrine of merger of the legal and equitable estates.

It is a fundamental rule that the beneficiary of a private trust must be a definite, ascertained or ascertainable person. Thus, a gift to A in trust for such objects of benevolence and liberality as A shall approve of is void because of the indefiniteness of the beneficiaries.[38] The trust is not charitable because others than objects of charity may be admitted to its

[35] Georgia Code, § 3729; Gray v. Obear, 54 Ga. 231.

[36] 2 Washburn, Real Property (3d ed.), pp. 173, 198, cited in Salem, etc., Mills Co. v. Stayton, etc., Co., 33 Fed. 146, 153.

[37] Haxtun v. Corse, 2 Barb. Ch. 506 (N. Y.).

[38] Morice v. Bishop of Durham, 10 Vesey 522 (Eng.), LEADING ILLUSTRATIVE CASES.

benefits, and as a private trust it cannot stand for lack of known beneficiaries to enforce it.[39] To this requirement of definiteness charitable or public trusts form a great exception. It is their distinguishing feature that their beneficiaries are indefinite persons.

A private trust for an unincorporated association is valid, not as a trust for the association which is not a legal entity, but as a trust for the members of the association at the time of the creation of the trust.[40] Even though the trust be for indefinite members of a class, as for the Roman Catholic incorporated institutions of New York City to be selected by the trustees, yet, if there is a power of selection in the trustees, the trust may stand as a private trust, since the beneficiaries are ascertainable, although not ascertained.[41]

Trusts for the care of animals are allowed in a few cases, although the beneficiaries obviously have no capacity to enforce the trust.[42] But generally in this country, in the absence of statute, trusts for the erection or repair of monuments are not allowed as private trusts. If the monument is to be for the testator, provision for it may be allowed as a part of the funeral expense. If it is to be erected for a public man, it may be allowed as a charitable trust.[43] But as a private trust it is indefensible because of the

[39] For articles on this case and the general subject of definiteness of beneficiaries, see 5 Harvard Law Review 389, and 15 Harvard Law Review 67.

[40] Austin v. Shaw, 10 Allen 552 (Mass.); Hart v. Seymour, 147 Ill. 598.

[41] Power v. Cassidy, 79 N. Y. 602.

[42] In re Dean, 41 Ch. Div. 552 (Eng.).

[43] Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9.

lack of a beneficiary with capacity to enforce the trust. Trusts for the saying of masses are generally enforcible as public or charitable trusts, but not as private trusts. As trusts of the latter kind they fail because of the absence of a beneficiary with capacity to enforce them.[44]

78. **Acceptance or refusal of the trust by the beneficiary.**—A trust cannot be forced upon a beneficiary. He must, in order that a valid trust may exist, at some time indicate his consent to become the beneficiary of the trust.[45] This acceptance need not, however, be made at the time the trust is created. The beneficiary need have no knowledge of the trust at that time. It is sufficient if he later consent to it. The acceptance need not be by an express statement from the beneficiary. It may be implied from his acts in taking the benefits of the trust or in recognizing the trustee. If the trust is wholly beneficial an acceptance of it by the beneficiary will be presumed.[46] But if there are attached to the trust any conditions onerous to the beneficiary, his acceptance of the trust will not be presumed and must be expressly proved.[47]

79. **The beneficiary's rights and obligations.**—The most obvious right of the beneficiary is that the trust, as declared and defined in the trust instrument, be carried out by the trustee. If the trustee holds the legal title to land for the purpose of paying to the beneficiary the net income thereof during his life,

[44] In re Schouler, 134 Mass. 426.
[45] Cunniff v. McDonnell, 196 Mass. 7.
[46] Furman & Co. v. Fisher, 4 Coldw. 626 (Tenn.).
[47] Kemp & Buckey v. Porter, 7 Ala. 138.

it is the most fundamental right of the beneficiary to have the trustee collect the income, pay the expenses of the trust and deliver the net income to him. As a natural incident of this right is the right of the beneficiary to have the trustee refrain from all breaches of trust, such as a conveyance of the property to a third person without authority, or the use of the trust funds for the benefit of the trustee. The beneficiary also has a right to know whether his interests are being properly protected by the trustee and what the value and state of the trust property are. This right to knowledge about the trust estate entitles the beneficiary to demand an inspection of all documents and books connected with the trust administration and that the trustee keep and present upon proper occasions accurate accounts of his dealings as trustee.[48]

The beneficiary's rights do not usually include the right to the actual use and enjoyment of the trust property. The very creation of the trust ordinarily indicates that another than the beneficiary is to manage and control the property, but that the beneficiary is to derive some benefit therefrom. Hence if land be given to A in trust to pay to B the net income during B's life, B is not entitled to go upon the land and cultivate it and possess it.[49] He must be content with accepting from A the net profits which A is able to make from the land by renting it or using it himself. The terms of the trust may, however, be such that, although the trust is active and the trustee

[48] Green v. Brooks, 81 Cal. 328.

[49] Wickham v. Berry, 55 Pa. St. 70.

has duties, it is the expressed intent of the settlor to allow the beneficiary to use the trust res himself. But if the trust is passive merely, then the rights of the beneficiary do include possession. Thus a gift of land to A in trust for B, with no mention of any duties on A's part, would create a passive trust and entitle B to enjoy the land by actual occupation.

It is the prevailing rule that it is one of the rights of the beneficiary to call on the trustee for a conveyance of the trust property, either to the beneficiary or to a stranger. Thus, if land be left to A in trust, to hold for ten years and pay the net income to X, Y and Z, and at the end of that period sell it and pay the proceeds to X, Y and Z, the latter as beneficiaries may call upon A before the ten years have elapsed to end the trust by a conveyance to them or to a purchaser of the property from them, according to some American cases,[50] but not according to the view existing in Massachusetts and New York.[51] The prevailing rule is based on the principle that the sole beneficiaries are the only persons interested in the trust property and ought to be allowed to dispose of it as they wish. They lack nothing except the legal title to make their ownership complete.

The beneficiary has the right of alienating or encumbering his interest. In the absence of statutory prohibition or direction by the settlor the beneficiary may sell his right to the present or future benefits of the trust or may mortgage or otherwise encumber

[50] Huber v. Donoghue, 49 N. J. Eq. 125.
[51] Claflin v. Claflin, 149 Mass. 19.

such right. This right of alienation is removed by statute in the case of certain trusts in a few states.[52] And in the majority of states this right of alienation may be done away with by the settlor, through the insertion of a clause expressing such intent.[53] It is self-evident that the beneficiary has a right to have third persons refrain from injuring the trust estate. Thus, if a stranger is trespassing upon the trust property and taking its profits, the beneficiary is injured and in a way hereafter described may have his remedy.

The trust property may consist wholly or in part of choses in action in favor of the settlor, such as promissory notes. Who is entitled to receive payment of and discharge such obligations? It is generally not a right of the beneficiary to discharge obligations owned by the trust estate, but is the right of the trustee. Therefore, in an action by the trustee against the obligor, a discharge by the beneficiary is no defense.[54] But in some cases, where the beneficiary has had the whole beneficial interest and the trust was practically passive, the beneficiary has been allowed to discharge the obligation.[55]

If the trust property consist of stock of a corporation, it is not one of the rights of the beneficiary to vote upon that stock, but is rather the right of the trustee by virtue of his legal title.[56] But if the

[52] 2 Perry, Trusts (6th ed.), § 827a.

[53] Broadway Nat. Bk. v. Adams, 133 Mass. 170, LEADING ILLUSTRATIVE CASES. See § 50.

[54] Gibson v. Winter, 2 L. J. (N. S.) 130 (Eng.).

[55] McBride v. Wright, 46 Mich. 265.

[56] Matter of Barker, 6 Wend. 509 (N. Y.).

trustee threatened to vote the stock so as to cause irreparable injury to the beneficiary, equity would prevent such voting by an injunction.[57]

The beneficiary's liabilities because of the trust are negligible. He is not bound by the contracts of the trustee with respect to the trust property, nor is he liable for the trustee's torts committed in the administration. The burdens of the trust fall upon the trustee, who is entitled to reimbursement for the charges which he incurs which are proper trust expenditures. Thus, the taxes upon the trust property are assessed against the trustee and with reference to his place of residence.[58]

[57] McHenry v. Jewett, 90 N. Y. 58.
[58] People ex rel. Kellogg v. Wells, 182 N. Y. 314.

CHAPTER X.

THE BENEFICIARY—HIS REMEDIES.

80. **The beneficiary's remedies—(a) Are in equity.**—With a few exceptions, to be mentioned hereafter, the beneficiary of a trust has no standing in a court of law. The trust is the creation of the court of equity. It was created by it to give a remedy in cases where none existed at law. Upon the legal side of the court the legal title of the trustee must prevail. Thus, if A settle a trust upon B to hold land for the benefit of A, and B wrongfully convey the land to X and receive certain moneys therefor, A cannot sue B in a court of law as for money had and received, but must bring a bill in equity against B for the breach of the trust.[59] While the distinctions between courts of equity and those of law are now in many jurisdictions less sharply drawn than formerly, it is important still to bear in mind that the beneficiary's rights are enforced on the equity side of the court.

An exception to the rule confining the beneficiary to courts of equity exists in cases of trusts which have been so far performed that there is due to the beneficiary from the trustee a definite sum of money. "It is well settled that a cestui que trust cannot bring an action at law against a trustee to recover for money had and received while the trust is still open;

[59] Norton v. Ray, 139 Mass. 230, LEADING ILLUSTRATIVE CASES.

but when the trust has been closed and settled, the amount due the cestui que trust established and made certain, and nothing remains to be done but to pay over money, such action may be maintained."[60] Thus, in the case last cited, the trustee had rendered a final account showing a definite balance due to the beneficiary and the latter was therefore allowed to maintain an action at law for that sum.

The beneficiary's rights are so distinctly equitable that, when sued in a court of law, the beneficiary could not set up his interest in the trust property, because of the rule that equitable defenses were not interposable in courts of law. But this rule is now largely done away with by statutes allowing equitable defenses to be set up in legal actions.[61] The beneficiary may not maintain an action of tort against the trustee for damages for breach of the trust. He must proceed in equity. But, of course, in many situations which may give rise to implied trusts the beneficiary has legal actions open to him. Thus, if A's chattels are stolen by B and sold for money, A may establish a constructive trust in equity as to the proceeds or sue at law. Or, if A's land is fraudulently procured to be conveyed to B and B converts the land into money, A may maintain an action to establish a constructive trust, or may sue B at law for money had and received, or may maintain an action of tort at law for damages for the injury done him by the deceit. In these cases of implied trusts the beneficiary has his choice of legal or equitable remedies.

[60] Johnson v. Johnson, 120 Mass. 465, 466.
[61] Cavalli v. Allen, 57 N. Y. 508.

If he takes the former, there is no trust. It is only in cases of express trusts that the exclusive equitable jurisdiction exists.

81. **Same subject—(b) Are against the trustee.**—Strictly speaking the beneficiary is not the owner of the trust property, but is the owner of a claim against the trust. The beneficiary is often said to be the beneficial owner of the trust property or the owner of the equitable title to the trust property. But this is the use of language loosely and is only an approximate statement of the beneficiary's situation. There can be only one absolute owner of property. That is the trustee. The beneficiary owns other property of an intangible kind, namely, a claim against the trustee to have the terms of the trust carried out.[62]

That this statement of the beneficiary's position is true is shown by an examination of the remedies open to him. His right to have the trust enforced is adjudged by a court of equity in a suit against the trustee. The court in which the action is brought will have jurisdiction if the summons is served upon the trustee with due legal formality. It is unnecessary that the trust property should be within the state in which the action is brought. Thus, the trust property may be land located in Maine. The usual rule is that actions relating to land must be brought in the state in which the land lies. But if a court of Massachusetts can get jurisdiction of the person of the trustee by the proper service of summons, it can and will enforce the trust. Its decree will be that

[62] See article by J. B. Ames, 1 Harvard Law Review 9.

the trustee do or refrain from doing certain acts. It will be a decree in personam. It will not be that the land be sold or that anything else be done with it. It will not be a decree in rem.[63] And so, too, even though the land which is the subject-matter of the trust be within the state of Illinois, the courts of that state will have no jurisdiction over a suit to enforce the trust, unless they obtain jurisdiction over the trustee by service upon him, either personally or by statutory service by publication or substitution. The trustee is the important element in the beneficiary's suit. His claim is not against the trust property.[64] If both trustee and trust property be outside the jurisdiction of the court of equity in which the suit is brought, the court will have no jurisdiction to give relief to the beneficiary.[65]

The nature of the beneficiary's right is further shown by the rules with respect to actions by or against strangers with respect to the trust property. If the beneficiary really owned the trust property, it would be natural that he be allowed to maintain an action for injury to it or to recover it. But the general rule, irrespective of statute, is that the trustee alone can maintain such an action. He owns the property and, if it is injured or wrongfully withheld by a stranger, he may and ought to obtain relief for such injury or detention. But the beneficiary must seek his relief through the trustee against whom his rights exist.[66] In many states, however, there are

[63] Gardner v. Ogden, 22 N. Y. 327.
[64] Felch v. Hooper, 119 Mass. 52, LEADING ILLUSTRATIVE CASES.
[65] Henry v. Doctor, 9 Oh. 49.
[66] Bailey v. N. E. Mut. L. Ins. Co., 114 Mass. 177.

statutes providing that the real party in interest must sue. These statutes except trustees of express trusts, and have been construed as permissive only so that either the trustee or the beneficiary would seem to be entitled to maintain an action with regard to the trust property under such statutes.[67]

There is a general exception to the rule requiring the trustee to bring all actions with respect to the trust property. If the trustee refuse to bring such action, the beneficiary may begin it himself, making the trustee a co-defendant with the stranger.[68]

It has been stated by good authority that "in suits in equity in relation to the estate by or against strangers, both the trustee and the cestui que trust must be parties. * * *"[69] But it is submitted that the exception to this rule, namely, that the beneficiary need not be made a party to a suit by or against the trustee, unless the beneficiary's interest is not adequately represented by the trustee, is of equal importance. Thus, generally in bills to recover the trust property from a stranger, bills to foreclose mortgages held by the trust estate, bills to redeem trust property under foreclosure sales, bills for specific performance of contracts to buy from or sell to the trust estate, bills to restrain encroachments on the trust property, or actions to obtain damages for injuries to the trust property, the trustee is deemed to represent the beneficiary sufficiently to allow the maintenance of the action without the

[67] New York Code of Civ. Pro., § 449; Potter v. Potter, 8 Civ. Pro. R. 150 (N. Y.).

[68] Anderson v. Daley, 38 N. Y. App. Div. 505.

[69] 2 Perry, Trusts (6th ed.), § 873.

joinder of the beneficiary.[70] And so in suits by a stranger to defeat the trust, the beneficiaries are not necessary parties unless there is some conflict of interest between the beneficiaries and the trustee or some other reason for making it advantageous to the beneficiary to have the opportunity for appearing in court and acting personally. As long as the powers and duties of the trustee are broad enough to enable him fully and fairly to represent the beneficiary, he may do so.[71]

82. **Same subject—(c) May compel the performance or non-performance of an act.**—If the trustee fails to perform the trust, the beneficiary may apply to equity for an order compelling the trustee to do the acts which he has been failing to perform. Thus, when the trust calls for a conveyance of lands to the beneficiary and the trustee fails to do so, he will be ordered to deed the lands to the beneficiary and account for the rents and profits thereof.[72] As previously noted,[73] it is one of the duties of the trustee to give to the beneficiary information regarding the trust and an account of his acts as trustee. The performance of this duty will be enforced by court order upon application of the beneficiary. Similarly, the court will enjoin the performance of acts which are not in performance of the trust and which are detrimental to the trust estate. Thus, if the title to the trust property be in dispute, so that its full value

[70] 2 Perry, Trusts (6th ed.), § 873; Ames, Cases on Trusts (2d ed.), note, p. 261; Carey v. Brown, 92 U. S. 171, LEADING ILLUSTRATIVE CASES.

[71] Kerrison v. Stewart, 93 U. S. 155.

[72] Crawford v. Ginn, 35 Iowa 543.

[73] See § 72, ante.

could not be obtained upon a sale of it, the trustee will be restrained from selling it.[74] Or the trustee may be restrained from removing the trust property beyond the jurisdiction of the court which is administering the trust.[75]

83. **Same subject—(d) May obtain change of control of trust property.**—If the rights of the beneficiary are being violated because of the negligence, incompetence or dishonesty of the trustee, he may apply to equity for a change in the control of the trust property. This will be brought about through the removal of the trustee and the appointment of a new trustee who will have the same duties as the original trustee, or through the placing of the trust property in the hands of an officer of the court called a receiver. The grounds upon which a trustee will be removed and a new one appointed have been previously considered in this article.[76] A receiver will be appointed by equity for the trust property with reluctance and only in case of danger of loss to the trust property.[77]

84. **Same subject—(e) May hold the trustee personally liable.**—If the trustee violate the rights of the beneficiary by neglect or misconduct, the beneficiary may hold the trustee liable in money for the damage caused. The beneficiary may elect to pursue this remedy, though the remedy later to be discussed of following the trust funds is open to him. Thus, if the trustee deposit trust moneys in a bank in

[74] Faulkner v. Davis, 18 Gratt. 651 (Va.).

[75] Symons v. Reid, 58 N. C. 327.

[76] See § 76, ante.

[77] Poythress v. Poythress, 16 Ga. 406.

his own name and the bank fail, the beneficiary may recover of the trustee the amount of the deposit.[78] It was a breach of trust so to deposit the moneys. Or if the trustee convert the trust property to his own use, the beneficiary may hold him liable for its value.[79]

85. **Same subject—(f) May follow the trust property.**—"Trust property or property substituted for it may be recovered from the trustee and all persons having notice of the trust. So long as the fund can be distinctly traced, the chancellor will follow it and fasten the purpose of the trust upon it, unless the rights of innocent third parties have intervened."[80] The remedies of the beneficiary so far discussed have been personal in their nature, namely, to compel the trustee to do or not to do certain acts, to remove the trustee from control, or to subject the trustee to a money liability. The remedy now to be discussed is impersonal, against the trust property or its substitute. The right of the beneficiary to have the trust property or its substitute, wherever found, subjected to the purposes of the trust, is collateral to the right to hold the trustee personally liable. Thus, if A is trustee of $1,000 for B, and A wrongfully uses the money to buy land from X, the title to which he takes in the name of A, B has several options. B may hold A responsible for the $1,000 and compel him to replace it, with interest. B may follow the $1,000 into the hands of X, if he can trace it, and

78 Naltner v. Dolan, 108 Ind. 500.
79 Peabody v. Tarbell, 2 Cush. 226 (Mass.).
80 2 Perry, Trusts (6th ed.), § 828.

if X knew of the breach of trust, and may subject that money to the purposes of the trust. B may follow the trust funds into the land which is now in A's name, and may impress a trust upon it. Or B may obtain a lien upon the land in A's name for the $1,000, foreclose that lien and hold A personally liable for the balance of the $1,000, if the land does not sell for that much.[81]

In the situation just given, there are four options, namely, to hold the trustee liable for the whole amount of the property misapplied, to retake the trust property, to follow the trust property into its substitute, or to obtain a lien on the substituted property and hold the trustee for any deficiency.

If the trust property has been misapplied by the trustee and is still in his hands, it is easy to understand how the beneficiary can retake it. Thus, if A, as trustee for B, take $1,000 of trust moneys and place them in a safety deposit box of his own, intending to appropriate them to his own use, it is obvious that B may retake the particular funds thus deposited and have them declared trust property. But more difficult questions arise when the trust property has disappeared but its substitute or proceeds are left, or where the trust fund or its substitute is mixed with private funds of the trustee. Such problems often arise upon the bankruptcy of the trustee. If the beneficiary is to have the right of following the trust funds into the bankrupt trustee's estate, he will be entitled to obtain the whole amount of the

[81] J. B. Ames, Following Misappropriated Property Into Its Product, 19 Harvard Law Review 511.

trust fund, but if he cannot follow the trust funds into such estate, he must be content to take his dividend with the general creditors.

The question of following trust funds into the assets of the trustee is essentially one of identification. The property to be taken by the beneficary must be identified as the original trust property or as its substitute. Regarding the degree of identification necessary to allow such pursuit of the trust fund, the courts differ. Some have held that the burden is on the beneficiary to show that the proceeds of the trust property have come into some specific fund or property of the trustee, and not merely into the general assets of the trustee.[82] Other courts are satisfied if the beneficiary can show that the trust property or its proceeds has entered into the general assets of the trustee and has remained there.[83] While still other courts have held that the beneficiary may follow the trust property into the assets of the trustee, if he can show that the trust property or its proceeds entered the trustee's general assets and went to benefit his estate, whether it remains there or not.[84]

Thus, if A, as trustee for B, misapplied $1,000 of trust funds, and then became bankrupt, the courts of the first class would require B, in order to entitle him to take $1,000 of the assets of A, to show that the original $1,000 was now represented by some specific fund of money or some specific piece of property

[82] Lowe v. Jones, 192 Mass. 94, LEADING ILLUSTRATIVE CASES.
[83] Cavin v. Gleason, 105 N. Y. 256, LEADING ILLUSTRATIVE CASES.
[84] Jones v. Chesebrough, 105 Iowa 303.

which the bankrupt A owned at the time of his bankruptcy. While the courts of the second class would allow B to take $1,000 if he could prove that the original $1,000 had gone into A's assets and had remained there. And the courts of the last class would be satisfied with proof that A had received the $1,000, even though he had later used it to pay his own private debts, and did not have it or its proceeds in his hands at his bankruptcy.[85]

Interesting and difficult questions arise when a trustee mixes trust funds with his own moneys and then makes withdrawals from or additions to the mixed fund. It is now generally held that withdrawals from such a fund are to be attributed to the private funds of the trustee and not to the trust funds. Hence, the beneficiary may follow the entire trust fund into such mixed fund so long as the mixed fund is as large as the trust fund. But if the mixed fund ever becomes less than the trust fund, the beneficiary will never be entitled to follow the trust fund into the mixed fund to a greater extent than this minimum sum, no matter how large the mixed fund later becomes.

Subsequent deposits or additions to the mixed fund will not be credited to the trust fund, but to the private funds of the trustee.[86] But, if the mixed fund is a deposit in the name of the trustee, as trustee, the subsequent additions to the mixed fund will be attributed to the trust portion of it, in an

[85] For discussions of the conflicting rules on this subject see 2 Harvard Law Review 28, note; 2 Perry, Trusts (6th ed.), pp. 1359-1363.

[86] In re Hallett's Estate, 13 Ch. Div. 696 (Eng.); Plano Mfg. Co. v. Auld, 14 S. D. 512.

amount sufficient to make up any deficiency due to withdrawals.[87]

If the trustee wrongfully transfers the trust property to a third person, the beneficiary may follow the trust property into the hands of such third person, if the third person knew of the breach of the trust, or did not pay value for the property.[88] Even if the third person taking the trust property did not actually know of the breach of trust, yet if he knew of facts which should have put him upon suspicion and which would have led to notice if he had made further inquiry, the beneficiary will be entitled to pursue the property. The third person must be a bona fide purchaser of the trust property, for value and without notice of the trust, in order to retain the property as against the beneficiary. A gift of the trust property by the trustee will not prevent a pursuit of the property into the hands of the donee.

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[87] United Nat. Bk. v. Weatherby, 70 N. Y. App. Div. 279.

[88] Austin v. Willson's Ex'rs, 21 Ind. 252; Trull v. Trull, 13 Allen 407 (Mass.).